(12)

No. 03-1601

Supreme Court, U.S.
FILED
DEC 17 2004
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
*Petitioners*,

*v.*

MARK J. ABRAMS,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF FOR RESPONDENT

SETH P. WAXMAN
*Counsel of Record*
WILLIAM T. LAKE
JONATHAN J. FRANKEL
PAUL R.Q. WOLFSON
ERIC R. COLUMBUS
BRIAN W. MURRAY
POLLY B. SMOTHERGILL
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street N.W.
Washington, DC 20037
(202) 663-6000

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

BEST AVAILABLE COPY

WILKIE CHEONG
CHEONG, DENOVE,
ROWELL & BENNETT
10100 Santa Monica Blvd.
Suite 2460
Los Angeles, CA 90067

CHRISTOPHER D. IMLAY
BOOTH, FRERET,
IMLAY & TEPPER, P.C.
14356 Cape May Road
Silver Spring, MD 20904

DAVID J. KAUFMAN
BROWN NIETERT &
KAUFMAN, CHARTERED
1301 Connecticut Ave., N.W.
Suite 450
Washington, DC 20036

## QUESTION PRESENTED

Whether a federal court may grant relief for a municipality's zoning decisions that violate the federal rights of wireless service providers under 47 U.S.C. § 332(c)(7)(B) by awarding compensatory damages, either under § 332(c)(7)(B) itself or through 42 U.S.C. § 1983, and, in its discretion, attorney's fees under 42 U.S.C. § 1988(b).

## TABLE OF CONTENTS


Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... v

STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT ..... 1

A. Statutory Background ..... 1

B. Facts and Procedural History ..... 9

SUMMARY OF ARGUMENT ..... 16

ARGUMENT ..... 18

A. The Section 1983 Remedy Is Withdrawn Only When Congress Creates A Comprehensive Alternative Enforcement Scheme That Would Be Inconsistent With Section 1983 ..... 21

B. Nothing In Section 332(c)(7) Is Inconsistent With A Section 1983 Remedy ..... 25

1. Section 332(c)(7) Itself Does Not Bar Damages As A Remedy ..... 26

2. Petitioners' Policy Arguments Against Damages And Attorney's Fees Are Misplaced ..... 35

3. The Statute Of Limitations Under Section 332(c)(7)(B)(v) Presents No Conflict With Section 1983 ..... 41

C. Any Doubt About The Availability Of Section 1983 Is Resolved By The Savings Clause In Section 601 Of The Telecommunications Act ..... 47

CONCLUSION ..... 50

## TABLE OF CONTENTS—Continued

Page

APPENDIX—Statutory Provisions Involved
28 U.S.C. § 1658 ..... 1a
42 U.S.C. § 1983 ..... 2a
42 U.S.C. § 1988 ..... 3a
Pub. L. No. 104-104, § 601 ..... 5a
Pub. L. No. 104-104, § 704 ..... 8a



## TABLE OF AUTHORITIES

### CASES

Page(s)

*APT Pittsburgh Limited Partnership* v. *Penn Township Butler County of Pennsylvania*, 196 F.3d 469 (3d Cir. 1999) ..... 31
*Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) ..... 47
*Adams* v. *Woods*, 2 Cranch (6 U.S.) 336, 342 (1805) ..... 45
*Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) ..... 28
*Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143 (1987) ..... 44, 45
*Airtouch Cellular* v. *City of El Cajon*, 83 F. Supp. 2d 1158 (S.D. Cal. 2000) ..... 32
*Alexander* v. *Sandoval*, 532 U.S. 275 (2001) ..... 26
*American Telegraph & Telephone Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214 (1998) ..... 49
*Barnes* v. *Gorman*, 536 U.S. 181 (2002) ..... 29
*Bell* v. *Hood*, 327 U.S. 678 (1946) ..... 29
*Blanchard* v. *Bergeron*, 489 U.S. 87 (1989) ..... 40
*Blessing* v. *Freestone*, 520 U.S. 329 (1997) ..... *passim*
*Carey* v. *Piphus*, 435 U.S. 247 (1978) ..... 19, 30
*Cellular Telephone Co. (d/b/a Cellular One)* v. *Village of Tarrytown*, 624 N.Y.S.2d 170 (App. Div. 1995) ..... 4
*Cellular Telephone Co.* v. *Zoning Board of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64 (3d Cir. 1999) ..... 6
*City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985) ..... 34
*City of Rancho Palos Verdes* v. *Abrams*, 124 Cal. Rptr. 80 (Ct. App. 2002) ..... *passim*
*City of Riverside* v. *Rivera*, 477 U.S. 561 (1986) ..... 40, 41
*Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974) ..... 38
*Darby* v. *Cisneros*, 509 U.S. 137 (1993) ..... 47
*DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983) ..... 44, 46
*Dennis* v. *Higgins*, 498 U.S. 439 (1991) ..... 39

## TABLE OF AUTHORITIES—Continued


Page(s)

*Dolan* v. *City of Tigard*, 512 U.S. 374 (1994) ..... 34
*Farrar* v. *Hobby*, 506 U.S. 103 (1992) ..... 41
*Felder* v. *Casey*, 487 U.S. 131 (1988) ..... 18, 20, 25, 31
*Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992) ..... 28, 49
*Friedman* v. *Berger*, 547 F.2d 724 (2d Cir. 1976) ..... 38
*Gabriele* v. *Rocchio*, 1994 WL 930886 (R.I. Super. Ct. 1994) ..... 3
*Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000) ..... 49
*Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) ..... 19, 23, 38, 39
*Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) ..... 38
*Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987) ..... 43
*Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979) ..... 24, 25, 28
*Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002) ..... 28
*Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982) ..... 37
*Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) ..... 40, 41
*Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004) ..... 44
*Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991) ..... 44, 46
*Livadas* v. *Bradshaw*, 512 U.S. 107 (1994) ..... 19, 23
*Maine* v. *Thiboutot*, 448 U.S. 1 (1980) ..... 36, 48, 49
*Marie O.* v. *Edgar*, 131 F.3d 610 (7th Cir. 1997) ..... 22
*Memphis Community School District* v. *Stachura*, 477 U.S. 299 (1986) ..... 37
*Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) ..... *passim*
*Monell* v. *Department of Social Services*, 436 U.S. 658 (1978) ..... 38
*Monroe* v. *Pape*, 365 U.S. 167 (1961) ..... 31




## TABLE OF AUTHORITIES—Continued


Page(s)

*National Tower LLC* v. *Frey*, 164 F. Supp. 2d 185 (D. Mass. 2001), *aff'd*, 297 F.3d 14 (1st Cir. 2002) ..... 7
*National Tower, LLC* v. *Plainville Zoning Board of Appeals*, 297 F.3d 14 (1st Cir. 2002) ..... 32
*Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928) ..... 34
*Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) ..... 41
*Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) ..... 29
*Nextel Partners, Inc.* v. *Town of Amherst*, 251 F. Supp. 2d 1187 (W.D.N.Y. 2003) ..... 6, 41
*Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) ..... 34
*Olympia Equipment Leasing Co.* v. *Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986) ..... 30
*Omnipoint Comms.* v. *Common Council of City of Peekskill*, 202 F. Supp. 2d 210 (S.D.N.Y. 2002) ..... 6
*Omnipoint Holdings, Inc.* v. *Town of Westford*, 206 F. Supp. 2d 166 (D. Mass. 2002) ..... 6
*Owen* v. *City of Independence*, 445 U.S. 622 (1980) ..... *passim*
*Owen* v. *City of Independence*, 560 F.2d 925 (8th Cir. 1977) ..... 38
*Padilla* v. *School Dist. No. 1*, 233 F.3d 1268 (10th Cir. 2000) ..... 22
*Patsy* v. *Board of Regents*, 457 U.S. 496 (1982) ..... 20, 26
*Paul* v. *Davis*, 424 U.S. 693 (1976) ..... 38
*Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) ..... 24
*Reno* v. *ACLU*, 521 U.S. 844 (1997) ..... 26
*Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992) ..... 19
*Smart SMR of New York, Inc.* v. *Zoning Commission*, 9 F. Supp. 2d 143 (D. Conn. 1998) ..... 41
*Smith* v. *Robinson*, 468 U.S. 992 (1984) ..... 21, 22
*SNET Cellular, Inc.* v. *Angell*, 99 F. Supp. 2d 190 (D.R.I. 2000) ..... 32

## TABLE OF AUTHORITIES—Continued


Page(s)

*Sprint Spectrum, L.P.* v. *Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997) ..... 7, 8
*Sprint Spectrum, L.P.* v. *Town of Farmington*, 1997 WL 631104 (D. Conn. 1997) ..... 7, 8
*Sprint Spectrum, L.P.* v. *Town of Ogunquit*, 175 F. Supp. 2d 77 (D. Me. 2001) ..... 7
*Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) ..... 49
*Town of Amherst* v. *Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9 17 (1st Cir. 1999) ..... 7
*United States* v. *Locke*, 529 U.S. 89 (2000) ..... 49
*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) ..... 7
*Verizon Comms., Inc.* v. *Law Office of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004) ..... 26
*Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635 (2002) ..... 22
*Western PCS II Corp.* v. *Extraterritorial Zoning Authority of City and County of Santa Fe*, 957 F. Supp. 1230 (D.N.M. 1997) ..... 6
*Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990) ..... 38, 39
*Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 177 (1985) ..... 47
*Wilson* v. *Garcia*, 471 U.S. 261 (1985) ..... 42, 45, 46
*Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987) ..... 23, 38


### STATUTES


Education Amendments of 1972
20 U.S.C. §§ 1681-1688 ..... 27
Education of the Handicapped Act
20 U.S.C. §§ 1400 *et seq.* (1982) ..... 21
Individuals with Disabilities Education Act
20 U.S.C. §§ 1400 *et seq.* ..... 21
28 U.S.C. § 1658 ..... 17, 42, 43




## TABLE OF AUTHORITIES—Continued


Page(s)

Equal Access to Justice Act
28 U.S.C. § 2412 ..... 39
Federal Water Pollution Control Act
33 U.S.C. § 1251 ..... 21
33 U.S.C. § 1365(e) ..... 48
Marine Protection, Research, and Sanctuaries Act
33 U.S.C. § 1401 ..... 21
33 U.S.C. § 1415(g)(5) ..... 48
United States Housing Act
42 U.S.C. § 1437a ..... 38
42 U.S.C. § 1981 ..... 43, 44
42 U.S.C. § 1983 ..... *passim*
42 U.S.C. § 1985(3) ..... 24
42 U.S.C. § 1988(a) ..... 17, 42
42 U.S.C. § 1988(b) ..... 13, 16, 20, 40
Civil Rights Act of 1964
42 U.S.C. § 2000a ..... 28
42 U.S.C. § 2000e ..... 24
47 U.S.C. § 152 note ..... 16, 48
47 U.S.C. § 252 ..... 22, 31
47 U.S.C. § 273(d)(5) ..... 31
47 U.S.C. § 302a(f)(4)(B) ..... 31
47 U.S.C. § 307(d) ..... 32
47 U.S.C. § 309(e) ..... 32
47 U.S.C. § 325(e)(9) ..... 32
47 U.S.C. § 332(c)(3) ..... 5
47 U.S.C. § 332(c)(7) ..... *passim*
47 U.S.C. § 543(a)(4) ..... 32
47 U.S.C. § 555(a) ..... 34
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
§ 601(c)(1) ..... 15, 18, 48, 49, 50
§ 704(a) ..... 5, 31


### LEGISLATIVE HISTORY MATERIAL


H.R. Conf. Rep. No. 104-458 (1996) ..... 5, 7, 47

## TABLE OF AUTHORITIES—Continued


Page(s)

H.R. Rep. No. 103-111 (1993) ..... 5
H.R. Rep. No. 104-204 (1995) ..... 5
S. Rep. No. 102-92 (1991) ..... 34
S. 2514, 105th Cong. (1998) ..... 47


### BOOKS, ARTICLES & TREATISES


Briffault, Richard, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346 (1990) ..... 2

Eagle, Steven J., *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U.L. Rev. (forthcoming 2005) ..... 8

Evans, Sara, *Wireless Service Providers* v. *Zoning Commissions: Preservation of State and Local Zoning Authority Under the Telecommunications Act of 1996*, 32 Ga. L. Rev. 965 (1998) ..... 8

Gerrard, Michael B., *The Victims of NIMBY*, 21 Fordham Urb. L.J. 495 (1994) ..... 2

Gregory, Michelle & Douglas Martin, *Cellular Facilities: A Survey of Current Zoning Practices*, Zoning News (Apr. 1996) ..... 3

Gustin, Timothy, *The Perpetual Growth and Controversy of the Cellular Superhighway: Cellular Tower Siting and the Telecommunications Act of 1996*, 23 Wm. Mitchell L. Rev. 1001 (1997) ..... 1

Hughes, David W., *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. Corp. L. 469 (1998) ..... 3, 8

Jackson, Irene McCormack, *Supervisors OK Plan for Cell-Phone Towers*, San Diego Union-Tribune, Jan. 24, 2001, at B1, *available at* http://www.telecomsol.com/tower_siting.html. ..... 8




## TABLE OF AUTHORITIES—Continued


Page(s)

Littlejohn, Jaymes D., *The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?*, 45 Fed. Comm. L.J. 247 (1993) ..... 1

Long, Robert, *Allocating the Aesthetic Costs of Cellular Tower Expansion: A Workable Regulatory Regime*, 19 Stan. Envtl. L.J. 373 (2000) ..... 1

Margulies, Peter, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not In My Backyard" Syndrome*, 43 Syracuse L. Rev. 945 (1992) ..... 2

Restatement (Second) of Torts § 874A (1979) ..... 30

*Six Years After the Act, Industry, Cities Still Battling Over Towers*, Telecommunications Reports, March 11, 2003 ..... 9

Tan, Gregory, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority Over Wireless Telecommunications Tower Siting*, 22 Vt. L. Rev. 461 (1997) ..... 9

Tuesley, Malcolm J., Note, *Not In My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L.J. 887 (1999) ..... 8

3 Ziegler, Edward H., Jr. et al., *Rathkopf's The Law of Zoning and Planning* § 62:46 (2004) ..... 32


### OTHER AUTHORITIES


Cellular Telecommunications Industry Association's Petition for Rule Making, FCC Docket No. 97-192, http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi ..... 3, 4

Fryer's Tower Source, http://www.towersource.com/mkt_analys_report.html ..... 35

Guidelines for Facilities Siting Implementation and Informal Dispute Resolution, http://www.fcc.gov/statelocal/agreement.html ..... 9

**TABLE OF AUTHORITIES—Continued**

Page(s)

Petition For Declaratory Ruling of the Cellular Telecommunications Industry Association in the Matter of Federal Preemption of Moratoria Regulation Imposed by State and Local Governments On Siting of Telecommunications Facilities, *available at* http://www.ctia.org/regulatory/filings/body.cfm?Reg_ID=7 (Dec. 16, 1996) ..... 9

## STATUTORY PROVISIONS INVOLVED

The appendix to this brief contains relevant provisions of 28 U.S.C. § 1658, 42 U.S.C. § 1983, 42 U.S.C. § 1988, Section 601 of the Telecommunications Act of 1996, and Section 704 of the Telecommunications Act of 1996, which enacted into law 47 U.S.C. § 332(c)(7).

## STATEMENT

### A. Statutory Background

1. This case concerns Congress's effort to address a persistent obstacle to the development of a seamless nationwide network of wireless telecommunications services—namely, entrenched local opposition to the antennas that are essential to such services. As demand for wireless services has exploded, and as new technologies have developed, wireless service providers have been required to add thousands of new antennas to ensure the uninterrupted service that their customers demand. Wireless providers frequently have little practical choice as to where such antennas may be sited; local conditions, including buildings and the physical terrain, often limit the places where a service provider can locate its antennas and still provide acceptable service.[1]

Although wireless services have been extraordinarily popular with the public, the antenna structures on which they depend have been decidedly less welcome. Wireless companies seeking to provide service to their customers

---

[1] *See* Brief of the Cellular Telecommunications & Internet Association ("CTIA") as *Amicus Curiae* at 1-5; Timothy Gustin, *The Perpetual Growth and Controversy of the Cellular Superhighway: Cellular Tower Siting and the Telecommunications Act of 1996*, 23 Wm. Mitchell L. Rev. 1001, 1005-1006 (1997); Jaymes D. Littlejohn, *The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?*, 45 Fed. Comm. L.J. 247, 247-250 (1993). As wireless subscribership grows, so does the need for additional antenna structures. *See* Robert Long, *Allocating the Aesthetic Costs of Cellular Tower Expansion: A Workable Regulatory Regime*, 19 Stan. Envtl. L.J. 373, 380-385 (2000) (noting that antennas can handle only limited call volume).

have encountered a well-known dysfunction of local government: the "NIMBY" problem—"not in my back yard." NIMBY describes the common phenomenon of individuals stridently opposing the placement of unpopular facilities in their communities even when everyone agrees that such facilities are necessary to the public good and should be placed somewhere—but always *elsewhere*.[2] Local officials tend to be responsive to the immediate opposition of the constituents who elected them rather than seemingly remote concerns about the need for the facilities in order to benefit the region or nation as a whole. Because the facilities often bring diffuse benefits but concentrated costs, voices of opposition frequently drown out voices of support.[3] It is often affluent communities that raise the loudest and most effective opposition, with the result that unpopular facilities are shifted to poorer and/or minority communities where opposition is less organized and carries less clout.[4]

Wireless service providers encountered this NIMBY problem in its classic form beginning in the 1990s, when demand for wireless service exploded but consumers who enjoyed the benefits of that service opposed siting of antennas in their communities. Local opposition to antennas for wireless services has tended to focus on three issues. First, individuals have expressed concern about possible adverse health effects from electromagnetic fields emanating from antennas—even though scientific studies have never documented any such adverse effects. Second, opponents have

[2] Other victims of NIMBY include low-income housing, homeless shelters, drug treatment facilities, group homes for the mentally ill, and waste disposal facilities. *See* Michael B. Gerrard, *The Victims of NIMBY*, 21 Fordham Urb. L.J. 495, 497-509 (1994); Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not In My Backyard" Syndrome*, 43 Syracuse L. Rev. 945, 946 (1992); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346, 435-447 (1990).

[3] *See* Margulies, *supra*, at 956-957 (discussing why groups supporting facility siting mobilize less readily than opponents).

[4] *See* Gerrard, *supra*, at 495-496; Margulies, *supra*, at 946-949.



maintained that antennas are visually unappealing and block desirable views (and wireless providers have often agreed to mask their antennas to address such concerns). Third, opponents have often expressed concern that erection of antennas would adversely affect the values of nearby residential properties.[5]

The local zoning process provided municipalities with numerous opportunities for obstruction and delay of the erection of antennas. These local bodies often impeded wireless facility construction by prolonging zoning proceedings, imposing cumbersome requirements and large fees, and habitually denying any new applications without following normal administrative procedures. In some instances, municipalities and zoning boards imposed moratoria on all new wireless facility siting proposals.[6] In others, zoning boards denied applications based on residents' aesthetic complaints or unsubstantiated health concerns, despite significant evidence supporting the wireless facility proposal.[7] Zoning

[5] *See* Michelle Gregory & Douglas Martin, *Cellular Facilities: A Survey of Current Zoning Practices*, Zoning News 1-6 (Apr. 1996) (discussing results of survey of jurisdictions about antenna siting practices). The survey revealed, among other things, that in every single responding jurisdiction, "strong opposition from adjacent residential or business property owners" had been the reason for denial of a permit to erect an antenna. *Id.* at 3.

[6] *See, e.g., Cellular Telephone Company (d/b/a Cellular One)* v. *Village of Tarrytown*, 624 N.Y.S.2d 170, 176 (App. Div. 1995).

[7] On one occasion, a local authority denied a permit because a resident alleged that an antenna killed her dog and gave her other pets headaches. *See* Comments of McCaw Cellular Communications, Inc. in Support of Petition for Rule Making, FCC Docket No. 97-192, at 14 (filed Feb. 17, 1995); David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. Corp. L. 469, 495 (1998) (sick pets caused antenna denial in West Hollywood, Cal.). *See also Gabriele* v. *Rocchio*, 1994 WL 930886 (R.I. Super. Ct. 1994) (reversing denial of permit based on unsupported aesthetic and health concerns); *Pennsylvania Cellular Telephone Corp.* v. *Board of Supervisors of Clifton Township*, No. 94-CIV-2595 (Pa. Comm. Pl. Lack. County 1994) (similar).

boards routinely demonstrated hostility to wireless facility applicants.[8]

In 1994, as wireless carriers' frustrations with localities grew, the industry association petitioned the FCC to consider preempting state and local zoning control of wireless facilities.[9] Numerous wireless carriers gave the FCC specific examples of the problems they had encountered with state and local governments in building their networks: moratoria on new facilities, lengthy and costly proceedings before zoning boards and planning commissions, and arbitrary and unsupported decisions, often based on unfounded health concerns.[10] Although the carriers had sought redress in state courts, these proceedings did not provide satisfactory relief. In addition to the cost and delays of litigation, carriers saw state-court judgments in their favor disregarded or maneuvered around by local bodies determined to prevent new facilities from being constructed.[11]

2. By 1995, the problem of entrenched local opposition to siting of wireless facilities attracted the attention of Congress, which had already made clear that state and local governments possessed only limited authority over wireless telecommunications. In 1993, Congress had preempted local regulation of market entry and rates "[t]o foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of

---

[8] *See* CTIA Brief at 25-29 (citing cases).

[9] *See* Cellular Telecommunications Industry Association's Petition for Rule Making, FCC Docket No. 97-192, at http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi (filed Dec. 22, 1994).

[10] *See, e.g.*, Comments of McCaw Cellular Communications, Inc. in Support of Petition for Rule Making, FCC Docket No. 97-192 (filed Feb. 17, 1995); Comments of Southwestern Bell Mobile Systems, Inc. (filed Feb. 16, 1995); Comments of NYNEX Mobile Communications Company (filed Feb. 17, 1995), at http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi.

[11] In Tarrytown, New York, for example, the village adopted a highly restrictive zoning ordinance after state courts repeatedly invalidated a moratorium. *See* Comments of McCaw at 11-12.



the national telecommunications infrastructure." H.R. Rep. No. 103-111, at 260 (1993); *see* 47 U.S.C. § 332(c)(3), 107 Stat. 394. Congress at that time had preserved local authority over facilities siting. *See* H.R. Rep. No. 103-111, at 261. By 1995, however, Congress was faced with the reality that this local authority was being abused to impede new wireless services and technologies, and that some restrictions on local zoning authority were necessary.

The initial proposal to emerge in Congress would have largely removed siting authority from the States. The original version of what eventually became 47 U.S.C. § 332(c)(7) would have directed the FCC to convene a negotiated rulemaking committee for the purpose of prescribing a national policy for the siting of wireless facilities "necessary to provide efficient wireless telecommunications services to the public." H.R. Rep. No. 104-204, Pt. 1, at 94 (1995). This proposal was based on the conclusion that "current State and local requirements, siting and zoning decisions by non-federal units of government have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit" full deployment of wireless technology. *Id.*

Congress eventually decided not to go so far, but it nonetheless imposed significant restrictions on local zoning authority to ensure that local officials would not improperly use their control over potential antenna structure sites to prevent wireless service providers from constructing coherent regional or national networks. This removal of local impediments to national wireless service was part of Congress's overarching objective, in the Telecommunications Act of 1996 (TCA), to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996).

The new restrictions on local zoning authority became Section 704(a) of the TCA, entitled "National Wireless Telecommunications Policy." 110 Stat. 151. That section enacted a new 47 U.S.C. § 332(c)(7). Section 332(c)(7) first states, in

subparagraph (A), that nothing in the relevant chapter of Title 47 *other than* § 332(c)(7) limits the authority of state and local governments over decisions regarding facilities siting—making clear that § 332(c)(7) itself imposes such restrictions. It then establishes, in subparagraph (B), five significant restrictions on that authority to ensure that it is not abused to the detriment of wireless service providers and their customers:

*First*, local governments may not "unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). Thus, municipalities may not refuse to site an antenna for a new service provider on the ground that its residents already have access to service provided by another carrier, nor may they favor one delivery technology over another where the two are equivalent.[12]

*Second*, local zoning may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). This provision bars local denials that effectively preclude wireless companies from providing service to areas in the community that are otherwise "dead spots."[13]

---

[12] *See Omnipoint Communications* v. *Common Council of City of Peekskill*, 202 F. Supp. 2d 210 (S.D.N.Y. 2002) (city unreasonably discriminated against wireless provider when it subjected application to unprecedented scrutiny relative to other carriers' applications); *Western PCS II Corp.* v. *Extraterritorial Zoning Auth. of City and County of Santa Fe*, 957 F. Supp. 1230 (D.N.M. 1997) (municipality denied carrier opportunity to compete and significantly increased its costs, which amounted to unreasonable discrimination); *Nextel Partners, Inc.* v. *Town of Amherst*, 251 F. Supp. 2d 1187 (W.D.N.Y. 2003) (town unreasonably discriminated against carrier by denying its application when it had approved a virtually identical application from another carrier two months earlier).

[13] *See Cellular Tel. Co.* v. *Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999) ("[L]ocal zoning policies and decisions have the effect of prohibiting wireless communications services if they result in 'significant gaps' in the availability of wireless services."); *see also Omnipoint Holdings, Inc.* v. *Town of Westford*, 206 F. Supp. 2d 166 (D. Mass. 2002) (town that denied application effectively prohibited wireless service where there was a significant gap in coverage and further applications would be futile); *National Tower LLC* v. *Frey*, 164 F. Supp. 2d 185 (D. Mass. 2001), *aff'd*, 297 F.3d 14 (1st Cir. 2002) (denial of permit where two-mile coverage gap existed and no alternative site was available constituted effective prohibition of service); *Sprint Spectrum, L.P.* v. *Town of Ogunquit*, 175 F. Supp. 2d 77 (D. Me. 2001) (town with no wireless antenna structures and virtually no wireless service had effectively prohibited service).



*Third*, any request to a local government for authorization to site a wireless facility must be acted on "within a reasonable period of time," 47 U.S.C. § 332(c)(7)(B)(ii)—thus rendering unlawful localities' prior foot-dragging techniques.[14]

*Fourth*, any decision to deny a siting request "shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). This provision ensures that siting decisions rest on a sound factual basis, rather than speculation or political pressure, and subjects siting denials to a uniform federal standard of review in the courts. That standard of review, "substantial evidence," is drawn from well-settled principles of federal administrative law. *See* H.R. Conf. Rep. No. 104-458, at 208 (1996); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1952).

*Fifth*, local officials may not make siting decisions based on the purported "environmental effects of radio frequency emissions," as long as the facilities comply with pertinent FCC regulations. 47 U.S.C. § 332(c)(7)(B)(iv).

---

[14] *See Sprint Spectrum, L.P.* v. *Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997) (local planning commission failed to act within a reasonable time where it enacted three successive moratoria and failed to process any applications for an extended period of time); *Sprint Spectrum, L.P.* v. *Town of Farmington*, 1997 WL 631104 (D. Conn. 1997) (moratorium that prevented carrier from even submitting application for 270 days constituted failure to act within a reasonable time). *See also Town of Amherst* v. *Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999) (noting that Congress intended § 332(c)(7)(B)(ii) to prevent municipalities from "exhaust[ing] applicants by requiring successive applications without giving any clue of what will do the trick").

In addition, Congress made clear that any wireless service provider whose application has been denied in violation of these prohibitions may obtain judicial relief. Under 47 U.S.C. § 332(c)(7)(B)(v), any person so adversely affected "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction," and the court "shall hear and decide such action on an expedited basis." Section 332(c)(7)(B) thus creates a series of specific, judicially-enforceable federal rights in providers of personal wireless services, but neither selects nor excludes any form of judicial relief.

3. Despite the enactment of § 332(c)(7), wireless service providers still encounter entrenched opposition to antenna siting.[15] Many municipalities reacted to the enactment of § 332(c)(7) by adopting moratoria (either *de jure* or *de facto*), in some cases lasting as long as two years, on any further antenna siting.[16] Wireless providers found it necessary to go back to the FCC to ask for relief from these moratoria.[17] The FCC established a committee of wireless carriers

[15] *See* Steven J. Eagle, *Wireless Telecommunications and the NIMBY Problem*, 54 Cath. U. L. Rev. (forthcoming 2005); Hughes, *When NIMBYs Attack*, *supra;* Malcolm J. Tuesley, Note, *Not In My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L. J. 887 (1999).

[16] *See Sprint Spectrum L.P.* v. *Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997) (finding unlawful county's enactment of three consecutive moratoria, amounting to over 15 months); *Sprint Spectrum L.P.* v. *Town of Farmington*, 1997 WL 631104 (D. Conn. Oct. 6, 1997) (finding unlawful town's nine-month moratorium, which included the submission of new applications); Irene McCormack Jackson, *Supervisors OK Plan for Cell-Phone Towers*, San Diego Union-Trib., Jan. 24, 2001, at B1 (noting moratoria adopted by communities in California). Many municipalities use the services of consultants (paid for by the applicant) who advise municipalities on how to adopt what amounts to a moratorium on new facilities sitings. *See* http://www.telecomsol.com/tower_siting.html.

[17] *See* Sara A. Evans, *Wireless Service Providers v. Zoning Commissions: Preservation of State and Local Zoning Authority Under the Telecommunications Act of 1996*, 32 Ga. L. Rev. 965, 971 n.28 (1998). The petition filed by the Cellular Telecommunications & Internet Association included examples of more than 100 communities in which a moratorium on new antenna structure sitings was in place at the time. *See* http://www.ctia.org/regulatory/fil-ings/body.cfm?Reg_ID=7 .



and state and local government representatives, which eventually brokered a compromise under which moratoria were limited to 180 days.[18] Even where moratoria are not in place, wireless providers continue to face considerable challenges in navigating the local zoning process for each application.[19] And, notwithstanding § 332(c)(7)'s promise of expeditious relief from the courts, litigation challenging unlawful permit denials can last for many months or even years (as demonstrated by this case, *see* pp. 13-15, *infra*), during which time wireless providers may suffer substantial economic damages flowing from a violation of their federal rights, including the loss of customers if they are unable to provide seamless service, and incur substantial litigation costs.

### B. Facts And Procedural History

1. Respondent Mark Abrams is licensed for amateur radio operations by the FCC. In that capacity, Abrams provides valuable services to the public.[20] Abrams also runs a company called Mobile Relay Associates, which is licensed by the FCC to provide personal wireless services. Pet. App. 22a; Stipulated Statements of Facts, *California* v. *Abrams*, No. BC 208586 (Cal. Super. Ct. filed Mar. 2, 2001) ("Stip."), ¶¶ 6, 29. Mobile Relay Associates provides a dispatch radio

[18] *See* http://www.fcc.gov/statelocal/agreement.html .

[19] *See Six Years After the Act, Industry, Cities Still Battling Over Towers*, Telecommunications Reports, March 11, 2003; Gregory Tan, *Wading Through the Rhetoric of the Telecommunications Act of 1996: Uncertainty of Local Zoning Authority Over Wireless Telecommunications Tower Siting*, 22 Vt. L. Rev. 461, 467-477 (1997).

[20] "As a group, amateur radio operators provide a valuable service to the public. They transmit information about emergency preparedness, national security, and disaster relief. Amateur radio has been credited, through the use of intercontinental communications, with enhancing international goodwill. And much of the highly developed radio communication technology existing today is the result of advances and discoveries made by amateur radio enthusiasts." *City of Rancho Palos Verdes* v. *Abrams*, 124 Cal. Rptr. 80, 82 (Cal. Ct. App. 2002).

service for police departments, fire trucks, taxicabs, school buses, tow trucks, and electricians. It competes with wireless providers such as Nextel, which provide a similar service but use different technology. Certified Administrative Record ("CAR") 763, 1524. Abrams provides these services using antennas at his residence, which is particularly well suited to this purpose because of its high elevation. *See City of Rancho Palos Verdes* v. *Abrams*, 124 Cal. Rptr. 2d 80, 82-83 (Cal. Ct. App. 2002); Stip ¶ 5. When this dispute began, no other provider in the City of Rancho Palos Verdes offered such personal wireless services. CAR 937.

This case concerns an antenna on Abrams' property that Abrams used exclusively for his amateur operations until city officials denied him the right to maintain a second antenna for commercial operations. In January 1990, Abrams obtained city approval to construct on his property a structure of 40 feet in height, including the antenna's underlying support structure but not the antenna itself, on his property for his amateur use. Pet. App. 22a, 54a; Stip. ¶ 8. Under a previous interpretation of the City's ordinances by its Planning Commission, Abrams' placement of a 12½-foot antenna atop this 40-foot structure was permissible. Thus, in April 1990, the City issued a permit for the antenna structure specifying a height of 52½ feet. Pet. App. 22a; CAR 50.[21]

For many years Abrams' antenna did not elicit any objection from the community. Disputes between Abrams and his neighbors arose in April 1997, when Abrams requested

[21] The City contends that local ordinances limited the total height of antennas, including both the supporting structure and the antenna itself, to 40 feet. *See* Pet. Br. 6 & n.2. Abrams has maintained that the pertinent ordinance limited only the supporting structure, exclusive of the actual antenna, to 40 feet. In the administrative proceedings that gave rise to this dispute, a member of the Planning Commission at the time that the pertinent antenna ordinance was enacted submitted a declaration to the effect that the total height of Abrams' structure, including the antenna extension, did not violate that antenna ordinance. CAR 351. In any event, there is no serious dispute that the City did issue a permit authorizing the antenna as built. *See* Pet. App. 22a.



the Planning Commission's approval for a second antenna, albeit shorter and less obtrusive than the one approved in 1990. The Planning Commission delayed action on that application for many months, deeming it incomplete at least three times. CAR 308; Stip. ¶¶ 17-18. The Commission eventually approved Abrams' application in January 1998. CAR 308; Stip. ¶ 21; Pet. App. 54a. The Commission's approval of the second antenna structure did not include any limitation to amateur operations. CAR 309.

A neighbor appealed the Planning Commission's approval of the second antenna to the City Council. Meanwhile, the City began to investigate allegations by the neighbor about the original antenna—specifically, that the structure exceeded its allowed height and that Abrams had improperly used it for commercial purposes. Pet. App. 54a; CAR 554. At a hearing before the Planning Commission in March 1998, Abrams acknowledged that he had used other antennas on his property (for which, he maintained, he did not need City approval)—but *not* the antenna approved in 1990—for commercial purposes. Pet. App. 40a; C.A. App. 110-111; *Abrams*, 124 Cal. Rptr. at 83-84; CAR 866. Abrams also maintained that he was permitted to use certain of his antennas for commercial purposes by virtue of his FCC licenses, which authorized his use of certain frequencies for commercial purposes and which (as a state appellate court later confirmed) preempted inconsistent limitations by the City. *See Abrams*, 124 Cal. Rptr. at 86.

While the investigation continued, the City Council enacted a moratorium against the acceptance and processing of applications for permits to construct more than one antenna structure on a property. Pet. App. 35a; CAR 554; Stip. ¶ 22. While the moratorium was in effect, the City cited the continued existence of Abrams' previously-approved antenna as its reason for denying his application for approval of other, unrelated improvements he had made on his property. Stip. ¶¶ 26-28. Following an extension by the City, the moratorium remained in effect for more than a year, until April 16, 1999, when the City enacted new regulations governing the

installation of antennas. Pet. App. 35a; Stip. ¶ 32. Those new rules had the effect of voiding Abrams' then two-year-old application for a second antenna support structure, which was still pending on appeal to the City Council. Pet. App. 35a-36a; CAR 554.

On April 12, 1999—less than a week before the moratorium ended and the new regulations came into effect—the City filed an action in state court to enjoin Abrams from using any antenna on his property for commercial purposes. Pet. App. 35a; *Abrams*, 124 Cal. Rptr. at 84. On June 29, 1999, the state trial court granted the motion for an injunction, and issued a written order on September 13 granting the relief the City sought. Pet. App. 35a. In the course of the proceedings, the state trial judge suggested that Abrams apply to the City for a conditional use permit (CUP) for commercial use of his antenna. *See Abrams*, 124 Cal. Rptr. at 84.

2. On July 12, 1999, Abrams applied to the Planning Commission for a CUP that would allow him to continue to use the existing antenna for additional radio frequencies allocated to personal wireless services, so that his business could continue to serve the area. Pet. App. 23a; CAR 16-38. The application explained that Abrams sought no modification of the existing antenna structure. CAR 17. The City's own notice of the project stated that "[n]o additional antennae or any change in the height, location or appearance of the existing antenna tower are proposed by the applicant." CAR 150.

After further delays and demands for information by the Planning Commission (CAR 43-46, 72-75, 84-85, 772-773), the Commission began to process the application and, on March 29, 2000, noticed it for a hearing and public comment. CAR 150. The application elicited opposition from Abrams' neighbors, who saw the hearing as an opportunity to force



Abrams to dismantle the existing antenna structure.[22] The hearing, which took place on April 25, 2000, reflected a mix of opinion in the community regarding Abrams' antenna. While some members of the community expressed opposition to the existing antenna structure, others commented on the usefulness of the service that Abrams provided. For example, a representative of the Los Angeles Unified School District stated that his association used Abrams' antenna structure to aid in communications among school buses. CAR 766-767. A company that provided much of the towing service for the City likewise reported its dependence on Abrams' service. CAR 551-552. After continuing the hearing to May 9, the Planning Commission denied Abrams' application. Pet. App. 54a-64a. Abrams appealed the decision to the City Council, which upheld the Commission on August 15, 2000. *Id.* at 34a-53a.

3. On August 24, 2000, Abrams commenced this action in district court. He contended that the City's denial of the CUP violated § 332(c)(7)(B)(i)(I), by unreasonably discriminating against the commercial mobile relay services that he sought to provide; § 332(c)(7)(B)(i)(II), by effectively prohibiting provision of such services within the City; and § 332(c)(7)(B)(iii), because the City's denial was not supported by substantial evidence in the administrative record. Relying on both the authorization for judicial relief in § 332(c)(7)(B)(v) and the express cause of action in 42 U.S.C. § 1983, Abrams sought an injunction directing issuance of the permit and money damages. He also sought attorney's fees under 42 U.S.C. § 1988(b).

The district court did not issue a decision until more than 16 months later, on January 9, 2002, when it ruled that Abrams' rights under § 332(c)(7)(B) had been violated and

---

[22] In the words of the district court, "[i]t is clear from the record that the City, and particularly the community in which [Abrams] resides, detests [Abrams'] antenna structure." Pet. App. 23a; *see also* CAR 96, 99-100, 164-337. On community hostility towards Abrams, see the amicus brief filed by Certain Individual Rancho Palos Verdes Residents, *et al.*

vacated the City's denial of his CUP application. Pet. App. 16a-33a. Specifically, the district court ruled that the City's denial was not supported by substantial evidence, in violation of § 332(c)(7)(B)(iii). As the district court explained, although neighbors objected to the visual impact of the antenna and perceived damage to property values, "the fact remains [that the] antenna is already in existence, thus there is no further aesthetic impact created by [Abrams'] proposed use" of the antenna for personal wireless services. *Id.* at 23a. "Therefore, aesthetic concerns would not constitute a valid reason for the denial of the CUP in this case." *Id.* at 23a-24a. Nor could denial of the CUP properly rest on Abrams' alleged misuse of the antenna for commercial purposes in violation of the original 1990 permit, because "denial of the CUP would [not] require [Abrams] to remove the antenna, or reduce the height to 40 feet, so the denial of the permit would only be an act of spite by the community." *Id.* at 24a.[23] The court also rejected the City's argument that granting the CUP could lead to a "proliferation in antennas," noting that the City "is free to deny additional applications if they pose additional problems." *Id.* at 25a.[24]

After further briefing on the proper remedy, the court limited Abrams to an injunction compelling the City to grant the CUP under reasonable conditions. The court denied

---

[23] In addition, a state appellate court later concluded that the City's restriction on the use of the antenna to amateur operations was preempted by federal law. *Abrams*, 124 Cal. Rptr. at 86-91. Thus, reliance on that restriction to deny the CUP would have been improper in any event.

[24] In light of its conclusion that the City had violated the "substantial evidence" provision of § 332(c)(7)(B)(iii), the court found it unnecessary to decide whether the City's action also violated § 332(c)(7)(B)(i)(I) by unreasonably discriminating against Abrams as a provider of personal wireless services, which compete with but are not identical to cellular telephone services. Pet. App. 26a-30a. The court did observe that Abrams "appears to have carried his burden" on that point. *Id.* at 29a. The court also ruled that denial of the CUP did not amount to a prohibition on the provision of personal wireless services in violation of § 332(c)(7)(B)(i)(II). *Id.* at 30a-32a.



Abrams damages or attorney's fees, stating that "the remedies available to [Abrams] are subsumed under the TCA, and that damages pursuant to 42 U.S.C. § 1983 are not available." Pet. App. 14a.

4. Abrams appealed the denial of damages and attorney's fees. The City initially appealed the district court's decision on the merits, but dismissed its appeal after a state appellate court ruled that the City had never been empowered to limit Abrams' use of his antenna to amateur operations. *See Abrams*, 124 Cal. Rptr. at 86.

The court of appeals reversed the denial of damages and attorney's fees, ruling that Abrams was entitled to the remedies available under § 1983 for the City's violation of his federal rights. The court of appeals first noted that the City had not disputed that § 332(c)(7)(B) granted Abrams "enforceable 'rights'" under federal law. Pet. App. 4a. Thus, the court explained, the only question was whether Congress had affirmatively foreclosed access to § 1983 for redress of those rights. *Id.*

The court found no evidence that Congress had "close[d] the door on § 1983 liability." Pet. App. 5a (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 348 (1997)). As the court explained, § 332(c)(7) does not expressly provide for any remedies (such as an injunction or damages); rather, it "only provides a short statute of limitations (30 days), expedited judicial review, and avenues through which a plaintiff can redress" violations[.]" *Id.* These features made § 332(c)(7) quite unlike the two statutes that this Court has found to foreclose liability under § 1983, both of which involved "unusually elaborate enforcement provisions." *Id.* at 6a (quoting *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981)). In the absence of concrete evidence that Congress had affirmatively foreclosed resort to § 1983 to remedy violations of § 332(c)(7)(B), the court concluded that "Congress intended to preserve an aggrieved plaintiff's right to invoke § 1983." *Id.* at 7a.

The court found its conclusion to be buttressed by the savings provision of § 601(c)(1) of the TCA, which provides

that the TCA "shall not be construed to modify, impair, or supersede Federal, state, or local law unless expressly so provided" in the TCA. Pet. App. 10a (quoting 47 U.S.C. § 152 note, 110 Stat. 143). As the court observed, "the plain language of § 601(c)(1) demonstrates that Congress did not intend the TCA to alter the operation of any federal law unless the TCA expressly provided for such change," and the TCA makes no reference to any alteration in the operation of § 1983. *Id.* In sum, the court concluded, "[t]he City failed to rebut the presumption in favor of § 1983 remedies. Accordingly, the presumption applies, and the district court should award § 1983 damages." *Id.* at 12a.

## SUMMARY OF ARGUMENT

In 47 U.S.C. § 332(c)(7)(B), Congress acted to remove entrenched local obstacles to wireless services. It did so by protecting wireless service providers from local governments' arbitrary and unsupported denials of permits for the antennas on which wireless services depend. It also made clear that any person aggrieved by such arbitrary action could seek relief in the courts, without any limitation as to the remedies that might be awarded. The right to be free from an arbitrary and unsupported denial of a permit may be remedied by an award of compensatory damages, either under § 332(c)(7)(B) itself or 42 U.S.C. § 1983, as well as a discretionary award of attorney's fees under 42 U.S.C. § 1988(b).

A. Because (as petitioners have conceded) § 332(c)(7)(B) creates federal rights, a violation of those rights may presumptively be remedied in an action under § 1983. Petitioners have not made the strong showing necessary to support a conclusion that Congress has barred recourse to § 1983. This Court has never suggested that § 1983 is supplanted whenever Congress confirms, in a separate provision, that a plaintiff has recourse to the courts to vindicate his or her federal rights. Rather, the Court has found the § 1983 remedy withdrawn only after a clear showing that the congressional scheme creating the right in question would be incompatible with private judicial enforcement under § 1983—as,



for example, where Congress either expressly limited the judicial remedies available or established elaborate exhaustion requirements designed to ensure that federal court intervention comes only as a last resort.

B. 1. There is no conflict between § 1983 and Congress's confirmation, in § 332(c)(7)(B)(v), that plaintiffs may go to court to remedy violations of § 332(c)(7)(B). Section 332(c)(7)(B) does not suggest that a court is barred from awarding compensatory damages. Absent clear direction from Congress, the federal courts are presumptively authorized to award compensatory damages for the violation of a federal right. No such contrary direction is found in the text of § 332(c)(7)(B)(v). Nor is such a conclusion supported by petitioners' suggestion that Congress intended merely to follow state laws for judicial review of zoning decisions. To the contrary, Congress departed from such laws in important respects, and § 332(c)(7)(B) would not have been necessary had Congress considered state-law remedies to be adequate.

2. Petitioners' policy-based arguments against damages are misplaced. Petitioners speculate that the availability of damages may cause overdeterrence of local officials, but experience and logic suggest that, absent a damages remedy, local governments will be insufficiently attentive to providers' rights under § 332(c)(7)(B). Local officials have every incentive to deny permits for antennas that are unpopular with local residents, even if those denials are later overturned (without a damages remedy). The Court's § 1983 cases have also long established that municipalities may be liable in damages for violations of federal rights, even if the rights are embedded in complex statutory regimes and benefit entrepreneurs.

3. The 30-day statute of limitations in § 332(c)(7)(B)(v) does not present a conflict with enforcement under § 1983. That limitation period governs actions to vindicate rights secured by § 332(c)(7)(B), even if pursued under § 1983. Both the introductory clause of 28 U.S.C. § 1658(a) and 42 U.S.C. § 1988(a) make clear that a court entertaining a

§ 1983 action to enforce rights under § 332(c)(7)(B) should look to that very statute for a limitation period.

C. The savings clause in § 601(c)(1) of the Telecommunications Act (TCA) further confirms that § 1983 remains available. That clause prohibits any construction of the TCA that would modify, impair, or supersede any provision of federal, state, or local law. Petitioners' submission would "supersede" § 1983, in contravention of settled law. By contrast, state immunity laws for local governments would not be "impaired," because by definition they apply only to actions brought under state law; federal law does not recognize municipal immunity for violations of federal rights.

## ARGUMENT

Section 1983 of Title 42 provides a judicial remedy "in an action at law, suit in equity, or other proper proceeding for redress" against "[e]very person" who, acting under color of state law, subjects "any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. As this Court has "repeatedly emphasized," the "central objective" of § 1983 "is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) (internal quotation marks omitted). Because § 1983 "provides a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation," it is "to be accorded a sweep as broad as its language." *Id.* (internal quotation marks and ellipses omitted).

To be sure, not every violation of federal law may be remedied through an action under § 1983. The Court has made clear, for example, that "to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997). But when—as is undisputed in this case—a violation of a federal right by one acting under color of state law has been established, there is a strong presumption that the plaintiff may obtain redress for that violation through an action under § 1983. This presumption is rooted in the capacious language and broad remedial purpose of § 1983 itself. And an action under § 1983 affords the plaintiff access to the full panoply of judicial remedies traditionally available in "an action at law"—including compensatory damages. *See Owen* v. *City of Independence*, 445 U.S. 622, 639-648 (1980); *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978).[25]



This presumption that § 1983 is available to redress a violation of a federal right may be overcome only in "exceptional cases." *Livadas* v. *Bradshaw*, 512 U.S. 107, 133 (1994). Specifically, "Congress itself might make it clear that a violation of a statute will not give rise to liability under § 1983, either by express words or by providing a comprehensive alternative enforcement scheme." *Id.* The burden to demonstrate that Congress has withdrawn the § 1983 remedy "is on the defendant," *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107 (1989), and that showing is a "difficult" one, *see Blessing*, 520 U.S. at 346.

This Court has never held the § 1983 remedy to be precluded merely because Congress has *confirmed*, in another provision, that the plaintiff has access to state and federal courts in order to obtain redress for a violation of his federally secured rights. Rather, this Court has found the § 1983 remedy to be withdrawn only when that remedy would be

---

[25] Petitioners conceded below that § 332(c)(7)(B) creates rights within the meaning of this Court's § 1983 jurisprudence, *see* Pet. C.A. Br. 3, and the court of appeals accepted that concession, *see* Pet. App. 4a. Neither in their petition for certiorari nor in their merits brief have petitioners attempted to withdraw that concession. Petitioners also dismissed their appeal from the district court's ruling on the merits that they violated § 332(c)(7)(B). *See* pp. 13-15, *supra*. Some of petitioners' *amici* have sought to raise the question of the existence of rights under § 332(c)(7)(B), but this Court's practice is not to entertain issues raised only by an *amicus*, especially when that issue was neither raised nor considered below. *See Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992).

*inconsistent* with a "comprehensive alternative enforcement scheme" devised by Congress to correct a denial of a particular federal right. As explained further below, the Court has found the § 1983 remedy to be inconsistent with (a) congressionally devised notice and exhaustion requirements imposed as a precondition to invocation of a judicial remedy, and (b) express limitations on judicial remedies. Such restrictions contradict basic principles of the § 1983 action—that such actions "belong in court," *Felder*, 487 U.S. at 148 (emphasis omitted); *see Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), and that a plaintiff in an action at law may obtain full compensatory relief, including damages.

No such inconsistency exists in this case. If anything, § 332(c)(7)(B) underscores that a plaintiff whose rights under that subsection have been abridged by a municipal government may seek immediate judicial relief, including compensatory damages, to redress that violation. And none of petitioners' various policy arguments overcomes the presumption that damages should be available to redress a violation of a federal right. Further, because petitioners have not made the "difficult showing" that redress may not be pursued under § 1983, respondent is entitled to apply for a reasonable attorney's fee under 42 U.S.C. § 1988(b). Anything less would deny respondent meaningful relief for petitioners' violation of his federal rights.

Congress enacted § 332(c)(7)(B) because it was concerned that municipalities were impeding the development of wireless telecommunications through their arbitrary treatment of wireless service providers who must erect antennas to serve their customers. To ensure that wireless providers would not encounter such obstacles in the future, Congress expressly stated that providers may bring municipalities to court when their rights under § 332(c)(7)(B) have been denied. Under petitioners' view, however, that confirmation of judicial review was ironical at best. Precisely by making it clear that wireless providers enjoyed federal statutory rights enforceable in federal courts, petitioners argue, Congress simultaneously deprived service providers



of the most effective remedy for their injury: compensatory damages. Nothing in § 332(c)(7), the text or history of § 1983, or this Court's jurisprudence regarding the enforcement mechanisms available to vindicate federal statutory rights supports such an anomalous result.

### A. The Section 1983 Remedy Is Withdrawn Only When Congress Creates A Comprehensive Alternative Enforcement Scheme That Would Be Inconsistent With Section 1983

"Only twice [has this Court] found a remedial scheme sufficiently comprehensive to supplant § 1983." *Blessing*, 520 U.S. at 347. In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the Court concluded that § 1983 did not provide a damages remedy for a violation of either the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251 *et seq.*, or the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1401 *et seq.* Central to the Court's decision in that case were that (a) both statutes expressly limited a plaintiff's judicial remedy in a citizen's suit to injunctive relief and precluded damages, *see* 453 U.S. at 7, 14, and (b) both statutes also required plaintiffs to give 60 days' notice to the alleged violator (as well as the EPA and the pertinent State) before commencing a citizen's suit, *see id.* at 7-8, 20. Thus, Congress gave private parties a limited judicial remedy, and tied that remedy to an administrative one, in the expectation that the EPA, the State, and the alleged violator could resolve any controversy without the need for judicial intervention.

Similarly, in *Smith* v. *Robinson*, 468 U.S. 992 (1984), the Court concluded that § 1983 did not provide a remedy for violations of a disabled child's rights under the Education of the Handicapped Act (EHA), 20 U.S.C. §§ 1400 *et seq.* (1982), or any factually-related equal protection claim.[26] In *Smith*,

---

[26] The EHA has since been substantially amended and superseded by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.

the Court stressed the elaborate administrative mechanisms established by Congress to resolve controversies between parents and local education authorities about a child's educational rights under the statute.[27] As the Court explained, those congressionally-devised administrative procedures "effect[ed] Congress's intent that each child's individual needs be worked out through a process that begins on the local level." 468 U.S. at 1011. Thus, the Court concluded, "it is difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go *directly to court*." *Id.* (emphasis added). Such a bypass of the administrative procedures mandated under the EHA would "render superfluous most of the detailed procedural protections outlined in the statute" at the administrative level and would "run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together." *Id.*

These cases do not hold, as petitioners and the United States suggest, that the § 1983 remedy is barred whenever Congress states elsewhere, in a statute conferring a federal right, that a plaintiff may obtain relief in the courts for a violation of that right.[28] If that were the rule of *Sea Clammers*

---

§§ 1400 *et seq.* As amended, IDEA presents issues similar to § 332(c)(7). Both statutes contain express rights of action, and both statutes have divided the courts of appeals on the question whether the rights secured thereunder may be enforced through § 1983. *Compare, e.g., Marie O.* v. *Edgar*, 131 F.3d 610 (7th Cir. 1997) (yes), *with, e.g., Padilla* v. *School Dist. No. 1*, 233 F.3d 1268 (10th Cir. 2000) (no). Petitioners' new rule—ousting § 1983 whenever an express right of action exists—would seemingly resolve that circuit split without allowing the Court the benefit of actually examining Congress's intent in passing IDEA or analyzing the statute's entire remedial scheme.

[27] The Court also expressed doubt that damages were available in an action under the EHA, although it did not resolve that issue. 468 U.S. at 1020 n.24.

[28] This is a reversal of position for the United States. In *Verizon Maryland, Inc.* v. *Public Service Commission of Maryland*, 535 U.S. 635 (2002), the United States argued that 47 U.S.C. § 252(e)(6), which expressly permits any party aggrieved by a state commission's determination under § 252 to seek relief in district court, was enforceable through § 1983. *See* U.S. Reply Br. in No. 00-1532, at 9-10 (Nov. 2001).



and *Smith*, this Court hardly would have referred to that rule as limited to "exceptional cases." *Livadas*, 512 U.S. at 133. To arrive at their desired conclusion, petitioners overstate the import of one sentence in *Wright* v. *City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 427 (1987), where the Court noted that, "[i]n both *Sea Clammers* and *Smith* v. *Robinson*, the statutes at issue themselves provided for private judicial remedy, thereby evidencing congressional intent to supplant the § 1983 remedy." The Court surely did not decide in either *Sea Clammers* or *Smith* that *any* private judicial remedy would necessarily supplant § 1983; if that were the holding of those cases, then the Court would not have found it necessary to discuss at length either the statutory limitations on the form of judicial relief or the elaborate administrative procedures that would have been undermined by immediate access to court.

Rather, as is made clear from the immediately following sentence in *Wright*, the Court was making the point—which runs as a consistent theme in its § 1983 decisions—that the § 1983 remedy will *not* be deemed withdrawn when Congress has *not* expressly provided for private judicial relief. *See id.* ("There is nothing of that kind found in the Brooke Amendment or elsewhere in the Housing Act."); *see also Blessing*, 520 U.S. at 347; *Golden State*, 493 U.S. at 106. The inverse proposition—that the § 1983 remedy is withdrawn whenever Congress does provide for judicial relief—does not follow.

*Sea Clammers* and *Smith* establish only that access to § 1983 may be deemed foreclosed when the limitations on judicial relief that Congress has placed in the statute creating the federal right are inconsistent with the hallmarks of private judicial enforcement under § 1983. As the Court explained in *Blessing*, the § 1983 remedy is withdrawn only when Congress creates a remedial scheme "that is *incom-*

*patible with* individual enforcement under § 1983." 520 U.S. at 341 (emphasis added). Petitioners are attempting to expand those decisions to create a new rule that § 1983 is foreclosed whenever Congress elsewhere provides for judicial relief at all; but as explained above, if that were the teaching of those cases, most of the discussion in them would have been unnecessary.

The Court's consistent approach to this issue also explains two other decisions on which petitioners and their *amici* rely, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), and *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979). In *Preiser*, the Court ruled that a prisoner challenging the very fact or duration of his confinement must seek relief under the habeas corpus statute and not § 1983. That decision too rested squarely on the incompatibility between habeas procedures and § 1983, and in particular on the fact that, in the habeas statute, "Congress clearly required exhaustion of adequate state remedies as a condition precedent of federal judicial relief." 411 U.S. at 489. As the Court explained (*id.* at 489-490), "[i]t would wholly frustrate congressional intent" if that exhaustion requirement could be evaded simply by invoking § 1983, which does not require exhaustion of state court remedies, *see Patsy*, *supra*.

Similarly, in *Novotny*, the Court concluded that 42 U.S.C. § 1985(3) does not provide a remedy for a violation of rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The Court stressed there that, "[a]s part of its comprehensive plan" in Title VII, Congress required complainants to invoke the procedures of either the Equal Employment Opportunity Commission or a state or local fair employment agency. 442 U.S. at 373. The Court further noted that "the statutory plan [in Title VII] prevents immediate filing of judicial proceedings in order to encourage voluntary conciliation." *Id.* at 373-374. And Title VII "expressly authorize[d] only equitable remedies" at the time, whereas § 1985(3), like § 1983, authorizes compensatory damages as a remedy. *Id.* at 376. Thus, "[i]f a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law." *Id.* at 375-376.



Like *Sea Clammers* and *Smith*, *Preiser* and *Novotny* indicate that access to the broad remedies of the Reconstruction-era civil rights statutes may be eliminated only when necessary to ensure the "[u]nimpaired effectiveness" of "the plan put together by Congress" for vindication of a statutory right (*Novotny*, 422 U.S. at 378). In particular, where Congress itself (a) precludes compensatory damages or (b) imposes elaborate exhaustion requirements in the hope that resort to federal court will ultimately be unnecessary to vindicate the federal right, it may be fair to infer that Congress intends that these limitations not be bypassed through recourse to § 1983. But these cases do not suggest that Congress will be deemed to have withdrawn the § 1983 cause of action merely because it has *confirmed* that a plaintiff may seek prompt judicial relief in any court of competent jurisdiction to enforce federal statutory rights. To the contrary, the cause of action created by § 1983 "exist[s] independently of any other legal or administrative relief that may be available as a matter of federal or state law." *Felder*, 487 U.S. at 148.

### B. Nothing In Section 332(c)(7) Is Inconsistent With A Section 1983 Remedy

Petitioners make three general arguments why a violation of § 332(c)(7)(B) may not be remedied through § 1983. First, they argue that § 332(c)(7)(B), although itself providing a cause of action to redress a violation of rights under that provision, limits the relief available in that cause of action to equitable relief. Second, and more generally, they argue that damages and attorney's fees would be inappropriate to remedy a violation of § 332(c)(7)(B) because, if made available to wireless service providers, they would cause overdeterrence of local governments. Third, they contend that allowing access to relief under § 1983 would un-

dermine the short, 30-day statute of limitations in § 332(c)(7)(B)(v). Each of these arguments is incorrect.[29]

### 1. Section 332(c)(7) Itself Does Not Bar Damages As A Remedy

**a.** Petitioners' principal argument is that a violation of § 332(c)(7)(B)(i)-(iv) may be remedied only through § 332(c)(7)(B)(v), which (they further argue) precludes an award of damages. Nothing in § 332(c)(7)(B)(v), however, suggests that damages are not available under that provi-

[29] Petitioners also suggest (Pet. Br. 24-27) that Congress's intent to foreclose resort to § 1983 for a violation of § 332(c)(7)(B) can be inferred from the Telecommunications Act of 1996 as a whole (or its predecessor, the Communications Act of 1934). Petitioners note that, in the TCA and the Communications Act, Congress expressly authorized judicial remedies for violations of other, unrelated statutory provisions, most of which involve duties imposed exclusively on private entities. This suggestion is implausible. As the Court is well aware, the TCA was a vast undertaking, encompassing such widely disparate topics as indecency over the internet, *see Reno* v. *ACLU*, 521 U.S. 844 (1997), and increased competition in local wireline telephone service, *see Verizon Comms., Inc.* v. *Law Office of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004). But only § 332(c)(7) addresses the harms at issue in this case—as § 332(c)(7)(A) makes clear. The fact that *other* TCA provisions remedy *other* harms does not establish the TCA as a comprehensive scheme to supplant § 1983 as a remedy for violations of the rights secured by § 332(c)(7)(B). Moreover, when Congress enacted the TCA, it built on another statute that had been enacted in many stages over many years. It would be wholly unrealistic to believe that Congress expected that all of the private remedies in the entire Communications Act would follow a uniform pattern.

It is particularly irrelevant that, in the TCA, Congress expressly provided for remedies, including damages and fees, in actions against *private* entities for statutory violations unrelated to the issues in this case. It was eminently sensible—and perhaps essential—for Congress to make clear in the text of the TCA itself when and how a cause of action could be pursued against private parties, given the trend in this Court's implied-right-of-action jurisprudence against inferring causes of action in the absence of express direction from Congress. *See, e.g., Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Section 1983, however, is an *express* right of action, and it is presumptively available to enforce any federal statutory right unless Congress clearly directs to the contrary. Congress has not done so in the TCA.



sion. Section 332(c)(7)(B)(v) states, in pertinent part, very simply: "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this paragraph may, within 30 days, commence an action in any court of competent jurisdiction." This sentence makes no reference to any kind of remedy that might be awarded, and certainly does not state that any particular remedy is precluded.

In the absence of clear indication by Congress to the contrary, "where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992) (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). The *Franklin* Court applied this "traditional presumption in favor of all available remedies" to hold that damages may be awarded under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, despite Congress's failure to specify a remedy. 503 U.S. at 72. As the Court explained in *Franklin*, a "long line of cases" holds that, "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief," including compensatory damages. *Id.* at 69; *see id.* at 70-71 ("The general rule . . . is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."); *id.* at 71 ("prevailing presumption in our federal courts since at least the early 19th century" is that "all appropriate relief," including damages, may be awarded).

The Court has long stressed that damages are presumptively appropriate to ensure complete relief for a violation of a federally protected right. *See Owen*, 445 U.S. at 651 (describing damages as a "vital component of any scheme" for relief). Indeed, under the common law, money damages, not equitable relief, was presumptively the relief to be awarded for violation of a right; "it is axiomatic that a court should

determine the adequacy of a remedy in law *before* resorting to equitable relief." *Franklin*, 503 U.S. at 75-76 (emphasis added). And historically, "[l]ocal governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations." *Owen*, 445 U.S. at 639. Were Abrams limited to equitable relief such as reversal of the permit denial, he would clearly receive inadequate redress for violation of his federal rights. Although Abrams eventually received the permit he should have received years earlier, he suffered substantial pecuniary loss in the interim. Under petitioners' submission, that loss would go entirely unredressed.

To be sure, the presumption in favor of damages may be overcome upon "clear direction to the contrary by Congress." *Franklin*, 503 U.S. at 70-71. Congress has made clear on many occasions when a remedy is to be limited to equitable relief.[30] But here Congress has provided no such direction. Neither the text nor the legislative history of § 332(c)(7) limits available remedies. Thus, contrary to petitioners' argument, compensatory damages would be available in an action brought directly under § 332(c)(7)(B)(v), even if a remedy under § 1983 were not available. *See Franklin*, 503 U.S. at 74 (refusal to award compensation for violation of a statutory right would be "to abdicate [the courts'] historic judicial authority to award appropriate relief in cases brought in our court system" (emphasis omitted)).

[30] *See Sea Clammers*, 453 U.S. at 7, 14 (stressing limitation in FWPCA to equitable relief); *Novotny*, 442 U.S. at 376 (stressing similar limitation in Title VII); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 151 n.5 (1970) (noting that Congress had made clear that relief under the public accommodations provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, was to be limited to injunctive relief, precisely so that Title II could not be enforced through § 1983, which could result in damages liability); *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209-219 (2002) (stressing limitation in ERISA to "equitable relief"). *See also* pp. 34-35, *infra* (discussing Congress's revision of law governing cable operators).



**b.** Petitioners invoke *Barnes* v. *Gorman*, 536 U.S. 181 (2002), for the assertion that compensatory damages would not be "appropriate" relief for a violation of § 332(c)(7)(B). *Barnes* offers little support to petitioners. *Barnes* held that punitive damages are unavailable in an implied private right of action brought to redress violations of rights secured by a federal statute enacted pursuant to the Spending Clause. Noting that Spending Clause legislation resembles a contract between the federal government and the States, the Court in *Barnes* analogized the case before it to an action brought by a third-party beneficiary to a contract to enforce rights under the contract, and observed that "punitive damages . . . are generally not available for breach of contract." *Id.* at 187. Thus, the Court concluded that Congress should be presumed to have intended that punitive damages not be available in such an action.[31]

*Barnes* did not address the proper remedy for the violation of a right created by legislation not enacted under the Spending Clause. Nor did *Barnes* suggest that plaintiffs seeking redress for violations of such statutory rights should not be fully compensated for their injuries. To the contrary, the Court in *Barnes* expressly reaffirmed the rule of *Bell* v. *Hood*, *supra*, that damages are presumed to be available to redress a violation of a federal right, and observed that "[w]hen a federal-funds recipient violates conditions of Spending Clause legislation, . . . that wrong is 'made good' when the recipient *compensates* . . . a third-party beneficiary . . . for the loss caused by that failure." 536 U.S. at 189.

Similarly, when a local governmental entity violates rights secured by § 332(c)(7)(B), that wrong is "made good" when the municipality "compensates" the party whose rights are violated "for the loss caused by that failure." The principle of compensation is entirely appropriate for a viola-

[31] Punitive damages are generally presumed to be unavailable in a § 1983 action against a municipality, *see Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 262-263 (1981), and would also be unavailable in an action brought to vindicate rights secured by § 332(c)(7)(B).

tion of § 332(c)(7)(B). That provision creates statutory duties, violations of which are generally remediable in tort principles, including compensatory damages.[32] Moreover, the specific duties created by § 332(c)(7)(B)—including the duty not to engage in unreasonable discrimination and the duty not to deny a permit without substantial evidence—establish obvious analogues to the constitutional principles of equal protection and due process (though affording less deference to the municipality's decision than the Constitution). It is well settled that a violation of those constitutional principles may be remedied through an award of compensatory damages. *See Carey*, 435 U.S. at 254-258. Just as § 1983 creates "a species of tort liability" for violations of the Constitution and laws of the United States, under which "[t]he cardinal principle" is "*compensation* for the injury caused to plaintiff by the defendant's breach of duty," *see id.* at 254, 255, so does § 332(c)(7)(B) anticipate that individuals whose rights are violated will be able to secure full relief under § 332(c)(7)(B)(v).

**c.** Petitioners further argue that § 332(c)(7)(B)(v) precludes damages because in enacting that provision, Congress intended to follow state statutes for judicial review of zoning decisions, which (petitioners maintain) do not allow damages

[32] A violation of a statutory duty owed to and creating rights for the benefit of a plaintiff is often considered a tort. *See* Restatement (Second) of Torts § 874A (1979); *see also Olympia Equipment Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.) (defining antitrust violation as "statutory tort"). Petitioners suggest that, as *Barnes* analogized to contract, this case should be analogized to zoning law because it involves a challenge to a zoning decision. But petitioners misconstrue *Barnes*, which did not look to the underlying facts, but rather considered how a violation of an analogous legal right would have been remedied under the common law. In *Barnes*, the Court concluded that the proper analogy was a contract action because a State incurs obligations under Spending Clause legislation only by voluntarily accepting federal funds to which those obligations are attached. Here, the proper analogy is a tort action, because municipalities are obligated to respect legal rights that Congress has secured in legislation enacted under the Commerce Clause.



to be recovered.[33] Congress, however, quite clearly departed from state law in enacting § 332(c)(7)(B)(v). Indeed, if Congress had thought that state laws presented the proper approach, it is unlikely that Congress would have enacted § 332(c)(7) at all. That provision was deemed necessary precisely because local zoning officials were abusing their authority and blocking facilities essential to wireless telecommunications, and because wireless providers had been unsuccessful in obtaining relief at the state and local levels. *See* pp. 3-4, *supra*. Thus, like § 1983, which supplements remedies available under state law, *see Monroe* v. *Pape*, 365 U.S. 167, 176 (1961), § 332(c)(7)(B)(v) confirms the existence of a "uniquely federal remedy," *Felder*, 487 U.S. at 139, for the deprivation of federal rights secured by § 332(c)(7)(B).[34]

[33] Petitioners place much emphasis on the title of § 332(c)(7), "Preservation of local zoning authority." Actually, the title of § 704(a) of the TCA, which enacted § 332(c)(7) into law, is "National Wireless Telecommunications Policy," 110 Stat. 151, suggesting an overarching congressional focus on accomplishing federal policy objectives rather than protecting local authority. Furthermore, § 332(c)(7)(A), which restates the general rule that local governments have zoning power over antennas, states that "nothing in this *chapter* shall limit" local authority over the siting of personal wireless service facilities "*except* as provided in this *paragraph*." 47 U.S.C. § 332(c)(7)(A) (emphases added). In other words, Congress made clear that § 332(c)(7) is the *only* paragraph in Chapter 5 of Title 47 that *does* limit local zoning authority. Section 332(c)(7)(A) provides a rule of construction for the *remainder* of Chapter 5—a rule aptly captured by the title of § 332(c)(7)—and states that § 332(c)(7) is the *exception* to that rule.

[34] Petitioners suggest that the 30-day statute of limitations is engrafted from local zoning law. But this limitation period merely reflects Congress's desire to expedite antenna determinations, and echoes the telecommunications code's frequent use of 30-day limits where fast-moving technological and market dynamics demand swift resolution of legal disputes. *See, e.g.*, 47 U.S.C. § 252(e)(4) (arbitrated agreements between telecommunications carriers are deemed approved if State does not act within 30 days), § 273(d)(5) (alternative dispute resolution involving Bell operating companies must enable resolution within 30 days), § 302a(f)(4)(B) (person affected by state or local government regulation of citizen band radio equipment may seek FCC review within 30 days of such

Those federal rights are not mere carbon copies of rights available under state law, as petitioners and some *amici* suggest. To give one example, § 332(c)(7)(B)(iv) bars municipalities from basing a siting decision on concerns about electromagnetic fields, provided that the emissions comply with FCC guidelines. Petitioners do not suggest that state laws usually contain a similar prohibition. Similarly, § 332(c)(7)(B)(i)(II) bars municipalities from effectively precluding the provision of wireless service—in contrast to local zoning laws that normally allow the exclusion of *any* activity, subject only to constitutional constraints. In addition—and contrary to petitioners' argument that § 332(c)(7)(B)(v) is nothing more than an "appeal" provision allowing on-the-record judicial review of agency decision-making—the lower courts have concluded that plaintiffs may develop a *de novo* record in the district court, at least in actions for vindication of some of these rights.[35] Section 332(c)(7)(B)(v) also requires such a court to expedite its ad-

decision), § 307(d) (station licenses may not be renewed more than 30 days after expiration), § 309(e) (petition for intervention in licensing hearing must be filed within 30 days of publication of hearing issues in Federal Register), § 543(a)(4) (certification of cable franchising authority deemed approved unless FCC disapproves within 30 days).

[35] *National Tower, LLC* v. *Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 22 (1st Cir. 2002) ("The anti-prohibition, anti-discrimination, and unreasonable delay provisions, 47 U.S.C. § 332(c)(7)(B)(i)-(ii) . . . may well require evidence to be presented in court that is outside of the administrative record compiled by the local authority."); *APT Pittsburgh Ltd. Partnership* v. *Penn Tp. Butler County of Penn.*, 196 F.3d 469, 475 (3d Cir. 1999) (decision on claim of prohibition of service "will not necessarily be limited to the record compiled by the state or local authority"); *Airtouch Cellular* v. *City of El Cajon*, 83 F. Supp. 2d 1158, 1163-1164 (S.D. Cal. 2000) ("in a claim alleging discrimination among carriers or providers of personal wireless services, outside evidence may be considered"); *accord SNET Cellular, Inc.* v. *Angell*, 99 F. Supp. 2d 190, 194 (D.R.I. 2000). By contrast, parties seeking state judicial review of a zoning decision usually may introduce evidence only at "the discretion of the reviewing court." 3 Edward H. Ziegler, Jr., et al., *Rathkopf's The Law of Zoning and Planning* § 62:46 (2004).



judication, another provision that has no parallel in state zoning law.[36]

Petitioners argue that, even if an action to vindicate other rights secured by § 332(c)(7)(B) could be remedied in damages, an action to vindicate the particular right that the district court found violated in this case—the right not to have a permit denied without substantial evidence, § 332(c)(7)(B)(iii)—may not be so remedied. But there is no basis in § 332(c)(7)(B) to conclude that Congress intended the various rights secured by that provision to be treated differently for purposes of remedies. Section 332(c)(7)(B)(v) makes clear that *all* of the rights secured by § 332(c)(7)(B), without distinction, are enforceable in court. It is common for plaintiffs to allege violations of more than one of the rights secured by that subparagraph, and as the district court observed in this case (Pet. App. 27a-28a), the rights tend to overlap to some degree.[37] And even if the "substantial evidence" standard of § 332(c)(7)(B)(iii) resembles the judicial review standard applicable in some States, there is no reason to believe that Congress was simply transplanting all the remedial features of state judicial review provisions into federal law. In defining the "substantial evidence" right, Congress clearly chose a *federal* standard as a uniform requirement for local government permit denials.

[36] Petitioners and the United States suggest that Congress's requirement of expedition in § 332(c)(7)(B)(v) is somehow inconsistent with § 1983. That contention is meritless. Section 1983 contains no policy against expedition. To the extent that Congress chooses to emphasize that actions to enforce certain federal rights should be expedited, that congressional policy is perfectly consistent with the general policy in § 1983 of full and effective enforcement of federal rights.

[37] Indeed, in this case, Abrams has also raised a claim of unreasonable discrimination under § 332(c)(7)(B)(i)(I). Although the district court suggested that the unreasonable discrimination claim had merit, *see* Pet. App. 28a, the court found it unnecessary to resolve that claim given its finding that the City had violated the "substantial evidence" right, *see id.* at 30a.

Moreover, federal judicial review of local zoning decisions, though expanded by § 332(c)(7)(B), is not exactly novel. The Court long ago made clear that zoning decisions must comply with constitutional demands, including the Due Process Clause, *see Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928), the Equal Protection Clause, *see City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), and the Takings Clause, *see Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987). Compensatory damages are available under § 1983 for violations of those federal rights. Nothing in § 332(c)(7)(B) suggests why damages should be available for violations of these constitutional guarantees in the context of zoning decisions, but not for violations of statutory provisions in the same context.

**d.** Finally, it bears note that, when Congress enacted the TCA, it knew well from recent experience how to limit telecommunications providers' remedies against municipalities—and knew the consequences of not doing so. In response to lower court decisions holding that municipalities could be sued under § 1983 to vindicate rights secured in various provisions of the telecommunications code, Congress passed the Cable Television Consumer Protection and Competition Act of 1992, which expressly limited remedies available to cable operators in most actions against municipalities regarding franchising decisions or cable service regulation to injunctive and declaratory relief. *See* 47 U.S.C. § 555a; S. Rep. No. 102-92, at 48-50 (1991). Four years later, when the very same congressional committees legislated in the same arena of relations between telecommunications providers and municipalities, they were well aware of the consequences of not expressly limiting available relief. Yet they did not, suggesting strongly the absence of any intention to foreclose either damages remedies or the availability of § 1983.



### 2. Petitioners' Policy Arguments Against Damages And Attorney's Fees Are Misplaced

**a.** Petitioners put forward several policy arguments why compensatory damages (under § 332(c)(7)(B)(v) or § 1983) and attorney's fees (under § 1988(b)) should not be available as remedies for violations of § 332(c)(7)(B). Although these arguments take different forms, they are all essentially variations on the same theme: wealthy telecommunications companies should not be allowed to obtain compensatory damages and attorney's fees from financially strapped local governments. The argument assumes that litigation over § 332(c)(7)(B) will necessarily pit a corporate behemoth against a hamlet. This very case, however, rebuts petitioners' stereotype. Mr. Abrams is an independent entrepreneur seeking to provide services on a small scale to residents of his community and the surrounding area. There are no doubt hundreds of similar ventures around the country providing wireless services of various types to local residents.[38] Should these service providers fail to receive adequate compensation for violations of their statutory rights (especially after being compelled to institute expensive litigation), they could well go out of business, which would frustrate Congress's purpose in enacting § 332(c)(7) of ensuring wide diffusion of, and vigorous competition in, wireless services.

In any event, the policy arguments that municipalities should not be required to pay damages (under § 1983) or at-

---

[38] *See* Brief of the American Mobile Telecommunications Association as *Amicus Curiae*. Although there are few published sources about the numbers of antenna structures owned by wireless service providers, we are informed by representatives at Fryer's Tower Source, which maintains antenna structure statistics, that approximately 35,000 such structures are owned by about 9,500 companies with an inventory of 10 structures or fewer. In addition, about 2,000-2,500 carriers depend on antenna structure companies because they do not own structures themselves. The number of structures owned by such "mom and pop" antenna structure companies is roughly to equal to the number owned by major wireless carriers. *See* http://www.towersource.com/mkt_analys_report.html .

torney's fees (under § 1988(b)) for violations of federal rights have been considered, and rejected, by this Court many times. They have been rejected because they *are* policy arguments and therefore are properly addressed to Congress. Congress has made clear, in the text of § 1983, that municipalities are required to compensate those whose federal rights they violate. *See Owen*, 445 U.S. at 650-652. And the text of § 1988(b) makes equally clear that "fees are available in *any* § 1983 action." *Maine* v. *Thiboutot*, 448 U.S. 1, 9 (1980). Section 1988(b) "makes no exception for statutory § 1983 actions," *id.*, or for § 1983 actions against municipalities.

Petitioners speculate that damages and attorney's fees will cause overdeterrence—that municipalities, fearing an expensive reversal of their policies in the federal courts, will overreact by granting permits that should not otherwise have been granted under state law. This is a common argument against a damages remedy. Its merits are debatable. What is not debatable is that when Congress made damages available under § 1983, it had precisely the opposite perspective—that absent the prospect of being required to pay full compensatory relief, municipalities might well fail to give proper consideration to individuals' federal rights. *See Owen*, 445 U.S. at 651-652.

There is good reason to believe that, absent a damages remedy for violations of § 332(c)(7)(B), municipalities would be insufficiently attentive to the rights secured by that section. As this case demonstrates, controversies over wireless antennas often feature organized vocal opposition by residents who are content to reap the benefits of wireless technology as long as some other community bears its costs. Without the deterrent potential of damages, local elected officials would have every incentive to appease their constituents and deny the permit—especially if, as petitioners suggest, the party seeking a site for the antenna will often be an out-of-town, nonvoting corporation. Even if, years later, a federal court orders them to grant the permit, the local officials would be in far better stead with their constituents than if they had acquiesced at the start. But a belated judicial "victory" would come at a considerable cost to a business owner such as Abrams, who is at risk of losing customers in the interim. The damages remedy of § 1983 was intended precisely to make sure that governmental actors would not shift the cost of their violations of federal rights to individuals in that way. *Cf. Memphis Cmty. School Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986) (noting that "[d]eterrence is also an important part" of § 1983, and that it "operates through the mechanism of damages that are compensatory" (emphasis omitted)).



**b.** Petitioners also argue (Br. 29-30) that damages are inappropriate in cases involving § 332(c)(7)(B) because that provision presents difficult legal issues about which local officials might guess wrong, ultimately to the fiscal detriment of the municipality. Petitioners' characterization of the complexity of § 332(c)(7)(B) is considerably exaggerated; there is no particular mystery about a rule barring reliance on environmental effects or requiring substantial evidence for a decision. Indeed, petitioners' position rests on the assumption that many of the requirements in § 332(c)(7)(B) merely restate well-known legal standards under state zoning law, with which municipal officials (or at least municipal lawyers) should be quite familiar.

The more fundamental point, however, is that there is no "difficult issue" exception for municipalities under § 1983 or § 1988(b).[39] Had the Court found this sort of argument persuasive, it most likely would not have ruled in *Owen* that municipalities have no good-faith immunity to § 1983 damages actions. *See* 445 U.S. at 651-652.[40] This Court has de-

---

[39] Of course, local officials possess qualified immunity for violations of rights that were not clearly established at the time of the violation. *See Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

[40] The Court was aware that the merits of the underlying legal issue in *Owen* were highly debatable, and the municipality's legal position was at least reasonable. *Owen* involved a police chief's challenge to his termination as a violation of his procedural due process rights. The court of

cided numerous § 1983 cases in which state and local officials were called on to administer highly involved federal statutory regimes or follow complicated constitutional doctrine, but it has never deemed the complexity of a legal issue to be a relevant factor in determining whether a municipality may be sued under § 1983. For example, in *Wright* v. *City of Roanoke*, *supra*, the Court ruled that a local governmental entity could be sued under § 1983 for a violation of the Brooke Amendment to the United States Housing Act, 42 U.S.C. § 1437a, *see* 479 U.S. at 423-432, even though the implementing agency regulations covered several pages and required local authorities to consider "a host of factors," *see id.* at 437 (O'Connor, J., dissenting). Similarly, the Court ruled in *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990), that § 1983 was available to enforce a provision of the Medicaid Act, the complexity of which is legendary.[41]

More generally, petitioners appear to suggest that it is inappropriate for business owners whose federal rights have been violated to invoke § 1983 for monetary relief from governmental units. But nothing in § 1983 precludes relief for entrepreneurs. To the contrary, it affords relief to "*any citi-*

---

appeals divided over whether the plaintiff had a liberty interest protected by the Due Process Clause or whether his claim was barred by *Paul* v. *Davis*, 424 U.S. 693 (1976). *Compare Owen* v. *City of Independence*, 560 F.2d 925, 935 (8th Cir. 1977) *with id.* at 941-942 (Van Oosterhout, J., dissenting). Similarly, *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), which recognized the principle of municipal liability under § 1983, involved a city policy of mandatory leave for pregnant employees that was at least arguably constitutional at the time suit was instituted in that case in 1971; such policies were not invalidated until this Court's divided decision in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). And in *Golden State*, the Court concluded that an employer could invoke § 1983 to remedy the city's violation of its rights under the National Labor Relations Act, *see* 493 U.S. at 111-112, even though the Court itself had divided on the merits of the underlying NLRA question in a prior decision, *see Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986).

[41] *See, e.g., Friedman* v. *Berger*, 547 F.2d 724, 727 n.5 (2d Cir. 1976) (Friendly, J.).



*zen* of the United States or *person* within the jurisdiction thereof" whose federal rights have been violated under color of state law. Accordingly, the Court has often found that statute to be available for vindication of the rights of entrepreneurs, no less than any other citizen or person within United States jurisdiction. In *Golden State*, the Court concluded that an employer could invoke § 1983 to vindicate its rights under the National Labor Relations Act to be free of municipal interference in its dispute with its employees' union. 493 U.S. at 112. In *Dennis* v. *Higgins*, 498 U.S. 439 (1991), the Court ruled that a motor carrier could invoke § 1983 to enforce his rights under the dormant Commerce Clause against discriminatory state taxation, and refused to limit § 1983 "to 'personal' rights, as opposed to 'property' rights." *Id.* at 445. And *Wilder* v. *Virginia Hospital Ass'n* confirmed that § 1983 was available for the enforcement of federal statutory rights by the hospital industry. 496 U.S. at 503.

Congress could undoubtedly determine that damages or fees should not be available in § 1983 suits brought by corporations or individuals with certain means. Congress has done something similar in the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, which generally allows an award of attorney's fees to a prevailing party in a suit against the United States. The EAJA precludes an award of fees to any individual whose net worth exceeded $2,000,000 at the time the civil action was instituted, or to the owner of any business with a net worth of more than $7,000,000 or more than 500 employees at that time. *See* 28 U.S.C. § 2412(d)(2)(B). Congress has done nothing of the sort, however, with respect to § 1983 or § 1988(b), and nothing in the text of either statute permits the courts to interpolate such a limitation.[42]

---

[42] As this case well demonstrates, not all § 1983 plaintiffs in the wireless context will be large corporations. But in any event, it is well established that, in light of Congress's broad policy of ensuring effective enforcement of federal rights through § 1983, the plaintiff's ability to pay for its own counsel does not preclude a fee award under § 1988(b). *See*

c. Finally, there is no merit to petitioners' suggestion that, if fees are available under § 1988(b) to service providers whose rights under § 332(c)(7)(B) have been violated, local governments will be routinely forced to pay enormous legal bills that will break the municipal bank. The federal courts have developed extensive experience with § 1988(b) and have devised numerous principles and safeguards to ensure that fees awarded under § 1988(b) are, as the statute on its face requires, "reasonable." "It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard* v. *Bergeron*, 489 U.S. 87, 96 (1989). The court's discretion in this regard is well defined, and there "exists a wide range of safeguards designed to protect civil rights defendants against the possibility of excessive fee awards." *City of Riverside* v. *Rivera*, 477 U.S. 561, 580 (1986); *see also Blanchard*, 489 U.S. at 96 (stating that "the very nature of recovery under § 1988 is designed to prevent [a] 'windfall'").

Above all, the attorney's fees awarded must reflect "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983). Thus, a court must deduct fees associated with hours that are "excessive, redundant, or otherwise unnecessary." *Id.* at 434. The court may also reduce the fee amount if the party seeking to recover it fails to satisfy its burden of documenting the propriety of the rates and hours claimed. *Id.* at 433. Even once this "lodestar" amount is calculated, it represents merely the "starting point" for determining the fee award, as the court must take other considerations into account. *Id.* at 433-434. Central among these is "the degree of success obtained." *See Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992). Thus, a party may not recover fees for work related only to claims on which it did not prevail, and may have its fees reduced if it "achieved only partial or limited success" in the lawsuit as a whole. *Hensley*, 461 U.S. at 434-435. Courts that have awarded attorney's fees in § 1983 suits brought by wireless companies have strictly adhered to these limitations and reduced attorney's fees as necessary.[43]

A court may further reduce a fee award if "special circumstances would render such an award unjust." *See Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). Municipalities are also not without recourse as defendants: if a wireless company's § 1983 lawsuit is deemed frivolous or was brought to harass, the city may seek to recover attorney's fees. *See City of Riverside*, 477 U.S. at 580. All of these safeguards can be expected to preclude the dire results that petitioners and others predict.

### 3. The Statute Of Limitations Under Section 332(c)(7)(B)(v) Presents No Conflict With Section 1983

Petitioners and the United States argue that enforcement of the rights secured by § 332(c)(7)(B) through § 1983 would be inconsistent with the short, 30-day statute of limi-

---

*Blanchard* v. *Bergeron*, 489 U.S. 87, 94 (1989) ("Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of [§ 1988]."). Even plaintiffs who can afford counsel might well hesitate to bring an action to vindicate their federal rights in light of the expense of legal proceedings.

[43] *See, e.g., Smart SMR of N.Y., Inc.* v. *Zoning Comm'n*, 9 F. Supp. 2d 143, 147-153 (D. Conn. 1998) (reducing a fee award based on the court's findings that the time spent preparing various pleadings was unnecessary and excessive, that some of the work related to administrative proceedings that occurred prior to the initiation of suit, and that the attorneys' time records were vague and insufficient); Memorandum Decision and Order, *Omnipoint Comms., Inc.* v. *City of White Plains*, No. 01 Civ. 3285, at 5-6 (S.D.N.Y. May 6, 2004) (reducing attorney's fees by 50%, after attorneys had already adjusted them by 50% to account for only partial victory, based on court's findings that the time entries were inadequate and that the attorneys did not present sufficient evidence regarding their experience and justification of their hourly rates); *see also Nextel Partners, Inc.* v. *Town of Amherst*, 251 F. Supp. 2d 1187, 1200 (W.D.N.Y. 2003) (describing the standard for determining a reasonable award of attorney's fees).

tations set out in § 332(c)(7)(B)(v). The curious assumption underlying this argument is that, if such a case were to proceed under § 1983 rather than directly under § 332(c)(7)(B)(v), a court entertaining the action would be *forbidden* to follow the 30-day limitation period that Congress enacted for enforcement of rights under § 332(c)(7)(B). Thus, petitioners and the government suggest, the court would have to apply either the residual four-year statute of limitations for federal causes of action in 28 U.S.C. § 1658 or a borrowed state statute of limitations. Neither proposition is correct. As we now show, a court adjudicating a § 1983 action to enforce the rights in § 332(c)(7)(B) should apply the 30-day statute of limitations attached to that section. Accordingly, there is no conflict between § 1983 and § 332(c)(7)(B) on this point.

**a.** This Court has often observed that § 1983 itself has no statute of limitations. *See, e.g., Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985). The constitutional provisions enforced through § 1983 also have no limitation periods attached to them. Accordingly, this Court concluded in *Wilson* that, for constitutional claims enforced through § 1983, courts should apply the general state statute of limitations for personal injury claims. In reaching that conclusion, the Court followed the directions of Congress set forth in 42 U.S.C. § 1988(a) with respect to filling gaps in federal civil rights laws, including § 1983. *See Wilson*, 471 U.S. at 268. Under § 1988(a), the jurisdiction of the district courts over civil rights cases "shall be exercised in conformity with the laws of the United States, so far as such laws are suitable to carry [the civil rights laws] into effect," but where no federal statute is "adapted to the object," the courts are to follow state law "so far as the same is not inconsistent with the Constitution and laws of the United States." Because no federal statute is "adapted to the object" of providing a limitation period for constitutional claims under § 1983, courts look to state law for the length of the limitation period (though federal principles govern *which* state period is to be adopted, *see id.* at 269).



The Court's decision in *Wilson* was consistent with its general approach of adopting state statutes of limitations for federal causes of action where no federal statute of limitations was specified or otherwise suitable. *See Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987) (borrowing state statute of limitations to apply to action under 42 U.S.C. § 1981). Subsequently, however, Congress enacted 28 U.S.C. § 1658(a), which—for civil claims arising under federal statutes enacted after December 1, 1990—provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues."

Petitioners argue that, if this case were to proceed under § 1983 rather than directly under § 332(c)(7)(B)(v), a court would have to apply the general four-year limitation period in § 1658(a). That is so, they contend, because Abrams' claim "aris[es] under" § 332(c)(7)(B), which was enacted after December 1, 1990. They further argue that the general four-year limitation period of § 1658(a) would be inconsistent with Congress's emphasis on expeditious resolution of controversies involving § 332(c)(7)(B), as evinced by the 30-day statute of limitations in § 332(c)(7)(B)(v) and Congress's direction in the same provision that all such actions be expedited.

But petitioners' argument overlooks the crucial initial clause of § 1658(a): "Except as otherwise provided by law". Congress has surely "otherwise provided," in § 332(c)(7)(B)(v), that a claim to enforce the rights set forth in § 332(c)(7)(B) must be brought within 30 days, even if the claim is brought under § 1983. Thus, even if this case "arises under" § 332(c)(7)(B), within the meaning of § 1658(a), nothing in § 1658(a) suggests that a court should look anywhere

other than § 332(c)(7)(B) for an appropriate limitation period to govern actions to enforce that very provision.[44]

This situation is similar to those in which the Court has concluded that it should look to another federal statute, rather than a state law, for the proper statute of limitations to govern a federal cause of action. For example, in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the Court concluded that, for private actions arising under § 10(b) of the Securities Exchange Act of 1934, the Court should adopt the limitation period appearing in related provisions of the Exchange Act. The Court observed that it could "imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provisions than the balance struck by the same Congress in limiting similar and related protections. When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end." *Id.* at 359 (citation omitted).[45] The case for applying the limitation period in the "statute of origin" is even stronger here, where the limitation period appears not in a "similar and related" provision, but in the very provision that is being enforced.

Petitioners erroneously suggest (Pet. Br. 33-34) that, under *Sea Clammers* and *Smith*, a court may not "transplant[]" any procedural requirements, including a statute of limitations, from another federal statute onto a § 1983 action.

---

[44] Although petitioners rely on *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004), to argue that the four-year statute of limitations would apply were the action brought under § 1983, they overlook that the Court had no occasion in *Jones* to consider the "[e]xcept as otherwise provided by law" clause of § 1658(a) precisely because that case involved a suit to enforce rights under a federal statute, 42 U.S.C. § 1981, that does not itself have a statute of limitations.

[45] *See also Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-156 (1987) (looking to Clayton Act rather than state law for statute of limitations for civil RICO actions); *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 161-171 (1983) (looking to federal labor law rather than state law for limitation period for hybrid § 301/duty of fair representation claim).



A statute of limitations, however, is not like the procedural restrictions at issue in those cases, which the Court deemed inconsistent with fundamental attributes of the § 1983 action. Section 1983 lacks its own statute of limitations, and so the limitation period for a § 1983 action is *always* transplanted from somewhere else—the only question is the source.[46] Whereas there might be situations where a *state* statute of limitations would be inappropriate to the goal of effective enforcement of *federal* rights enshrined in § 1983, *see Wilson*, 471 U.S. at 279, that could hardly be said of the federal statute of limitations that Congress itself attached to the federal right at issue.

**b.** Nor would a federal court apply a *state* statute of limitations to an action to vindicate rights secured by § 332(c)(7)(B), even if those rights are enforced through a § 1983 action. Conceivably, such a § 1983 action might be thought of as "arising under" § 1983 itself, rather than § 332(c)(7)(B).[47] But if that were the case, then it is clear from § 1988(a)—which is nowhere mentioned by petitioners or the government—that the 30-day limitation period of § 332(c)(7)(B)(v) would apply.

Section 1988(a) provides that, in actions under the federal civil rights laws, including § 1983, the courts shall exer-

---

[46] The Court has rejected the possibility that *no* limitation period might apply to § 1983 actions. *See Wilson*, 471 U.S. at 271 (stating that such a rule would be "utterly repugnant to the genius of our laws") (quoting *Adams* v. *Woods*, 2 Cranch (6 U.S.) 336, 342 (1805)); *see also Malley-Duff*, 483 U.S. at 156.

[47] The government suggests (U.S. Br. 23-24 n.4) that it is not altogether clear that Abrams' claim arises under § 332(c)(7)(B); the claim might be deemed to arise under § 1983—which was not enacted after December 1, 1990. This Court's recent decision in *Jones*, *supra*, may not definitively resolve that question, because *Jones* involved a claim that arose under a statute, § 1981, that provided both the underlying right and the cause of action. By contrast, § 1983 is only a cause of action and is not itself a source of rights. The issue is academic in this case because (as explained in the text) whether Abrams' claim is deemed to arise under § 332(c)(7)(B), § 1983, or both, the 30-day statute of limitations applies if the claim is brought under § 1983.

cise their jurisdiction "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect." Only if no "suitable federal rule exists" are courts to consider applying state law to fill the interstices of federal law. *See Wilson*, 471 U.S. at 267. In an action brought under § 1983 to enforce a federal *statutory* right where the pertinent statute itself provides a limitation period, it would surely be "suitable" for the courts to apply that very federal statute of limitations. It could hardly be "in conformity with the laws of the United States," § 1988(a), for a court to ignore that federal limitation period and apply a conflicting state statute of limitations.

Although the Court has held that state general personal injury statutes of limitations govern *constitutional* claims brought under § 1983, *see Wilson*, 471 U.S. at 271-272, that rule reflects the fact that no other federal law provides a statute of limitations for constitutional violations, and so the only place for the courts to look for a limitation period is state law. In the case of a § 1983 action to enforce statutory rights where the underlying statute itself provides the answer, there is no need for the Court to take the second step of looking to state law. The inquiry "should be at an end" with the federal statute. *Lampf*, 501 U.S. at 359.[48]

In sum, there is no reason to conclude that, in a § 1983 action brought to enforce rights under § 332(c)(7)(B), a court would apply either the four-year residual statute of limitations in § 1658(a) or a state statute of limitations under the "borrowing" principle of *Wilson*. The court would simply

[48] Given the goal of expedition, it would surely be "inconsistent with" and not "in conformity with" federal law, § 1988(a), to adopt a longer state statute of limitations, as the government proposes. *See DelCostello*, 462 U.S. at 161 (borrowing federal statute of limitations because it would be "inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law").



apply the limitation period found in § 332(c)(7)(B) itself. That provision, therefore, does not conflict with § 1983.[49]

### C. Any Doubt About The Availability Of Section 1983 Is Resolved By The Savings Clause In Section 601 Of The Telecommunications Act

Petitioners' novel theory that any express cause of action to enforce a statutory right automatically displaces § 1983 cannot be squared with the savings provision in

[49] There is no merit to the suggestion (Pet. Br. 32 n.10; U.S. Br. 25 n.5) that § 332(c)(7)(B) contains an exhaustion requirement and thereby conflicts with § 1983. Section 332(c)(7)(B)(v) allows immediate suit upon "*any* final action or failure to act by a State or local government *or any instrumentality thereof*" (emphases added). Thus, once an instrumentality of local government has taken final action on a permit application, an adversely affected person may sue, without seeking further review from any other governmental entity. Petitioners seek to pour an exhaustion requirement into the statutory requirement of "final action," but well-settled principles of administrative law are to the contrary. *See Darby* v. *Cisneros*, 509 U.S. 137 (1993) (requirement of "final agency action" under Administrative Procedure Act does not require exhaustion prior to judicial review); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). "The question whether administrative remedies must be exhausted is conceptually distinct ... from the question whether an administrative action must be final before it is judicially reviewable .... [T]he finality requirement is concerned with whether the *initial decisionmaker* has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 192-193 (1985) (emphasis added). The reference in the Conference Report to "final administrative action" (H.R. Conf. Rep. No. 104-458, at 208 (1996)) is entirely consistent with this analysis, for it echoes the Court's language in *Williamson County*, requiring only a non-interim, binding ruling by an administrative decisionmaker, not exhaustion of administrative remedies. Additional evidence of Congress's intent comes from the fact that, just two years after enactment of § 332(c)(7)(B), eleven Senators sponsored a bill that would have replaced, in § 332(c)(7)(B)(v), "30 days after such action" with "30 days after *exhaustion of any administrative remedies* with respect to such action"—further indicating that, as enacted, § 332(c)(7)(B) contained no exhaustion requirement. S. 2514, 105th Cong. (1998) (emphasis added).

§ 601(c)(1) of the TCA. Under the title "No implied effect," § 601(c)(1) states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152 note, 110 Stat. 143. Along with two companion provisions directed to preserving the reach of federal antitrust and tax laws, § 601(c)(1) makes clear that the TCA should be construed in conformity, not conflict, with other federal statutes.

Petitioners' argument contravenes this principle. Its basic thrust is that rights secured by § 332(c)(7)(B) may be enforced only under § 332(c)(7)(B)(v) but not under § 1983—even though under this Court's settled jurisprudence, § 1983 is presumptively available for the enforcement of all federal rights created by Congress, absent clear indication by Congress to the contrary. Thus, under petitioners' construction, § 332(c)(7)(B)(v) would clearly "supersede" § 1983 as the avenue for enforcement of those rights, under the ordinary understanding of that term. It would also "modify" and "impair" § 1983 in this context, because it would make attorney's fees under § 1988 unavailable, even though Congress has tied the two statutes closely together on the understanding that attorney's fees are necessary to ensure effective vindication of federal rights. *See Thiboutot*, 448 U.S. at 11.

This Court's discussion of two wholly different savings provisions in *Sea Clammers* is not to the contrary. In *Sea Clammers*, the Court concluded that savings clauses in the Federal Water Pollution Control Act, 33 U.S.C. § 1365(e), and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g)(5), preserved only substantive rights arising under other statutes or the common law, and did not preserve the right to sue under § 1983 for a violation of the pollution-control standards contained in the FWPCA and MPRSA themselves. *See Sea Clammers*, 433 U.S. at 20-21 n.31. As the Court explained, the FWPCA and MPRSA expressly limited the relief available in a citizen's suit to enforce those standards to injunctive relief, and it would have been peculiar for Congress to allow plaintiffs to avoid those



limitations simply by suing to enforce the very same standards under § 1983. *See id.* at 20.

*Sea Clammers* is thus an example of this Court's consistent jurisprudence with regard to savings clauses: a savings clause will not be read, in effect, to conflict with another provision in the statute to which it is attached. *See American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998); *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). No such concern is present in this case. As explained above (pp. 26-35), § 332(c)(7)(B) does not limit a plaintiff's remedies to injunctive relief. Accordingly, allowing a plaintiff to obtain damages through § 1983 would not undermine anything in § 332(c)(7)(B). Indeed, precluding a plaintiff from obtaining full relief, including damages and fees, would likely impair the effectiveness of § 332(c)(7)(B) because it would undermine much of the deterrent value of federal law in this context.

Nor is there merit to petitioners' argument that allowing a plaintiff to obtain damages for a violation of § 332(c)(7)(B) would impair *state* law, in contravention of § 601(c)(1) of the TCA. It has long been settled that municipalities may be liable in damages and required to pay attorney's fees if they violate individuals' federal rights. *See Franklin*, *supra* (damages remedy presumed appropriate for statutory violation); *Owen*, *supra* (rejecting municipal immunity under § 1983); *Thiboutot*, *supra* (holding that § 1988(b) applies to actions to enforce statutory rights). This is not an "impairment" of state law; it is simply an attribute of federal law. Nothing in § 332(c)(7)(B) purports to override any immunity that municipalities may have *under state law* for any violations *of state law* that they might have committed. Petitioners confuse our system of dual sovereignty with "impairment" of state law.[50]

---

[50] This Court has long read savings provisions in federal statutes not to preserve state laws that *conflict* with federal law. *See Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 870-871 (2000); *United States* v. *Locke*, 529 U.S. 89, 106-107 (2000). To the extent that state municipal im-

* * * * *

Congress enacted § 332(c)(7) because it determined that municipalities were improperly using their zoning authority to block the provision of wireless services to customers that find those services highly desirable. Under petitioners' proposed rule, a municipality could obstruct and delay free of cost—even if a federal court ultimately concludes that the municipality's denial of a permit for an antenna violated federal law. The cost to one such as Mr. Abrams, however, is very real indeed. In the telecommunications world, a year is a lifetime, but Abrams was forced to wait three years before his federal right to serve his customers was ultimately vindicated by the district court. Without full relief for that delay, the effectiveness of § 332(c)(7), for Abrams and others like him in the future, would be seriously undermined.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

munity laws would conflict with the application of § 1983—as petitioners seem to suggest they would—the savings provision in § 601(c)(1) would not preserve them.

SETH P. WAXMAN
*Counsel of Record*
WILLIAM T. LAKE
JONATHAN J. FRANKEL
PAUL R.Q. WOLFSON
ERIC R. COLUMBUS
BRIAN W. MURRAY
POLLY B. SMOTHERGILL
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street N.W.
Washington, DC 20037
(202) 663-6000

WILKIE CHEONG
CHEONG, DENOVE,
ROWELL & BENNETT
10100 Santa Monica Blvd.
Suite 2460
Los Angeles, CA 90067

CHRISTOPHER D. IMLAY
BOOTH, FRERET,
IMLAY & TEPPER, P.C.
14356 Cape May Road
Silver Spring, MD 20904

DAVID J. KAUFMAN
BROWN NIETERT &
KAUFMAN, CHARTERED
1301 Connecticut Ave., N.W.
Suite 450
Washington, DC 20036

DECEMBER 2004

# APPENDIX

# APPENDIX

## STATUTORY PROVISIONS INVOLVED

### TITLE 28, UNITED STATES CODE

**§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress**

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

## TITLE 42, UNITED STATES CODE

### § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.



## TITLE 42, UNITED STATES CODE

### § 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.



## THE TELECOMMUNICATIONS ACT OF 1996, PUB. L. NO. 104-104, 110 STAT. 56

### TITLE VI—EFFECT ON OTHER LAWS

### SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

(a) APPLICABILITY OF AMENDMENTS TO FUTURE CONDUCT.—

(1) AT&T CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(2) GTE CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(3) MCCAW CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the McCaw Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and subsection (d) of this section and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(b) ANTITRUST LAWS.—

(1) SAVINGS CLAUSE.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify,

impair, or supersede the applicability of any of the antitrust laws.

(2) REPEAL.—Subsection (a) of section 221 (47 U.S.C. 221(a)) is repealed.

(3) CLAYTON ACT.—Section 7 of the Clayton Act (15 U.S.C. 18) is amended in the last paragraph by striking "Federal Communications Commission,".

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

(d) COMMERCIAL MOBILE SERVICE JOINT MARKETING.—Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.

(e) DEFINITIONS.—As used in this section:

(1) AT&T CONSENT DECREE.—The term "AT&T Consent Decree" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, in the



United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(2) GTE CONSENT DECREE.—The term "GTE Consent Decree" means the order entered December 21, 1984, as restated January 11, 1985, in the action styled United States v. GTE Corp., Civil Action No. 83–1298, in the United States District Court for the District of Columbia, and any judgment or order with respect to such action entered on or after December 21, 1984.

(3) MCCAW CONSENT DECREE.—The term "McCaw Consent Decree" means the proposed consent decree filed on July 15, 1994, in the antitrust action styled United States v. AT&T Corp. and McCaw Cellular Communications, Inc., Civil Action No. 94–01555, in the United States District Court for the District of Columbia. Such term includes any stipulation that the parties will abide by the terms of such proposed consent decree until it is entered and any order entering such proposed consent decree.

(4) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.), commonly known as the Robinson-Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

**THE TELECOMMUNICATIONS ACT OF 1996,**
**PUB. L. NO. 104-104, 110 STAT. 56**

**TITLE VII—MISCELLANEOUS PROVISIONS**

* * * * *

**SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.**

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY.—Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(7) PRESERVATION OF LOCAL ZONING AUTHORITY.—

"(A) GENERAL AUTHORITY.—Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) LIMITATIONS.—

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

"(I) shall not unreasonably discriminate among providers of functionally equivalent services; and "(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.



"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

"(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

"(C) DEFINITIONS.—For purposes of this paragraph—

"(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

"(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

"(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).".

(b) RADIO FREQUENCY EMISSIONS.—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93–62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY.—Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.